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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1927 1930

No. ~~611~~ 701

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

AUGUST E. HOLMBERG

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

FILED NOVEMBER 10, 1927

(33,063)

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[fol. 4]

BEFORE NEBRASKA STATE RAILWAY COMMISSION

No. 515

AUGUST E. HOLMBERG, Plaintiff,

v.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Defendant

COMPLAINT—Filed September 16, 1924

The plaintiff in the above named complaint respectfully shows:

1. That he is a farmer by occupation and is the owner of the Northwest quarter (N. W. ¼) Section Twenty-four (24), Township Twenty-nine (29) North, Range Two (2) West, of the Sixth P. M., in Knox County, Nebraska, where he now resides and has resided for 15 years last past, and which premises are owned by the complainant by title in fee simple.

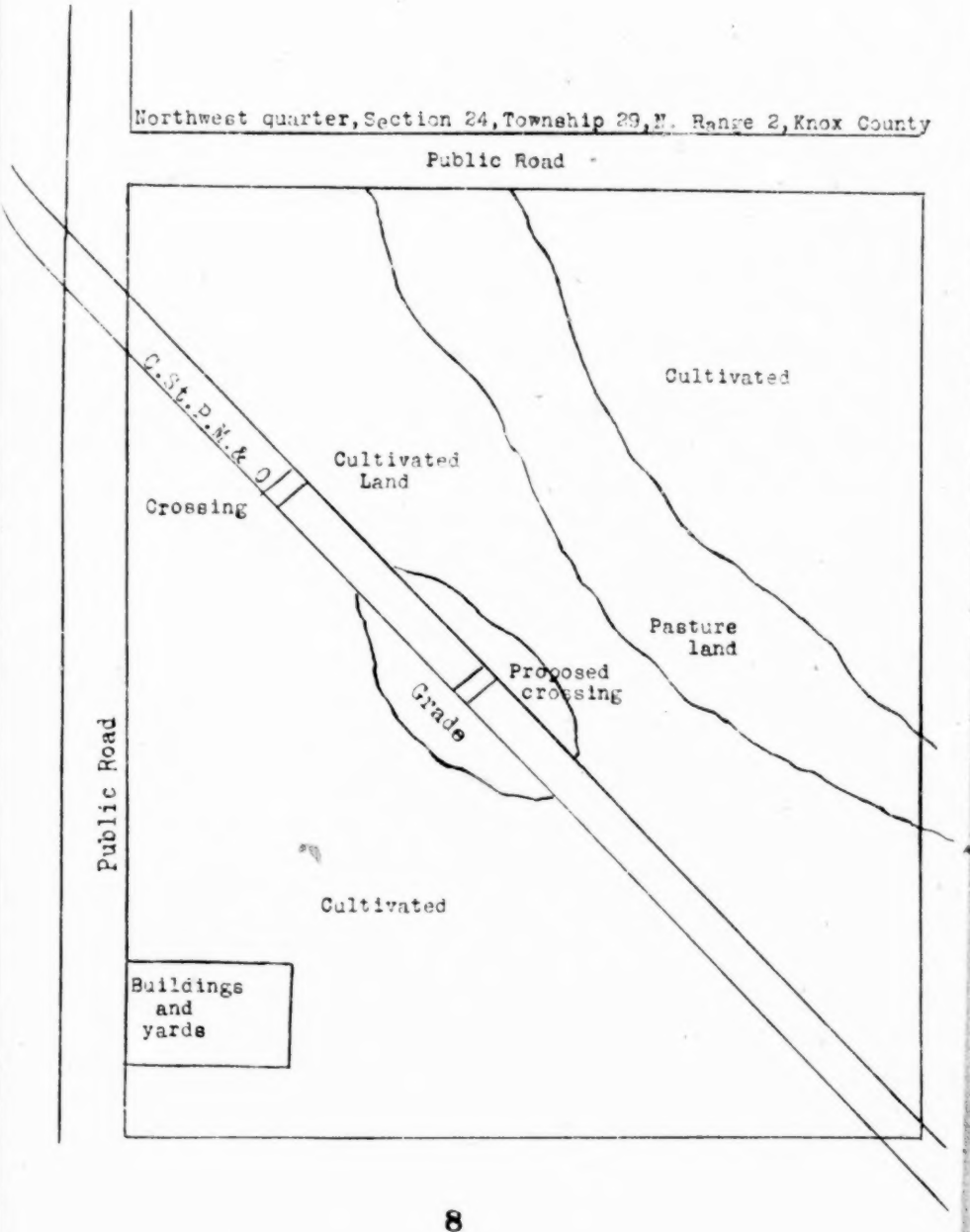
2. That the Chicago, St. Paul, Minneapolis & Omaha Railway Company is a corporation, operating a system of railways within the state of Nebraska, and their branch line from Wayne to Bloomfield, Nebraska, bisects petitioner's farm from the Southeast corner to the Northwest corner thereof, as shown by diagram, Exhibit "A" hereto attached [fol. 5] and made a part hereof; the buildings on said farm being located on southwesterly side, near the southwest corner of the quarter section; that the defendant above named is a common carrier engaged in the transportation of passengers and property by railroad between points in the state of Nebraska, and as such common carrier is subject to the provisions of the Nebraska State Railway Commission act approved March 27, 1907, and amendments thereto.

3. That your petitioner is 59 years of age and his family now residing with him on said premises, consists of his wife, who is 58 years of age, and one daughter; that due to the inadequate crossing over defendant's right of way on said land, it makes it almost impossible for your petitioner to utilise his pasture land on the northeast side of the track, of which there is about 18 acres that cannot be used for any other purpose and because of there being no water in said pasture it is necessary to drive the stock on public highway from pasture across track to buildings to water them where plaintiff's water supply is located, and the same condition exists during fall of year when plaintiff wants to feed stock on stubble ground, and during winter while stock is running in corn stalks and in fact said plaintiff needs an adequate stock crossing over defendant's right of way, on said land, every month in the year.

4. That the only means provided by defendant for crossing right of way on said land is by a level grade crossing through gates opening onto cultivated ground on both sides of track, and for said reasons stock cannot be transferred over said crossing from water supply to pasture, but compels plaintiff to drive his stock from his yards to pasture, on public highway and across defendant's track, a distance of about three fourths (¾) of a mile, whereas said land is [fol. 6] so situated that it would be easy to construct an underground crossing for stock, connecting pasture land with southeast part of land and a runway would connect same with plaintiff's yards and water supply, there being a draw or valley across said land where defendant has a grade through which a cattle runway could easily be constructed at small expense.

5. That to properly handle plaintiff's farm land described herein, it should have about 65 head of cattle thereon, but by reason of the inadequate crossing maintained by the defendant, plaintiff has been compelled to reduce his stock until he now has only 20 head, all of which has caused plaintiff irreparable damage and will continue to do so unless the defendant is required, by an order of the State Railway Commission, to construct an underground crossing as contemplated by Section 5527 of Compiled Statutes of Nebraska for 1922.

"EXHIBIT A" TO COMPLAINT



6. That plaintiff during spring of 1922 filed a complaint before this Commission, praying for an adequate underground crossing on said land; that a hearing was held before H. L. Cook, then a member of the Commission, and plaintiff's prayer was denied, but by reason of plaintiff's advanced age and physical infirmity, and the premises herein, it has become necessary that he renew his prayer for an adequate underground cattle crossing over defendant's right of way on said described premises.

Wherefore, the plaintiff prays that a time and place be fixed for hearing on this complaint; that due and legal notice thereof be given to the defendant and that upon proper hearing herein, that this Commission issue its order directing this defendant to erect and construct an underground cattle crossing as provided by law, and for such orders as will give the plaintiff proper relief in the premises.

(Signed) August E. Holmberg.

[fol. 7] *Duly sworn to by August E. Holmberg. Jurat omitted in printing.*

(Here follows Exhibit "A" to Complaint, marked side folio page 8)

[fol. 9] BEFORE NEBRASKA STATE RAILWAY COMMISSION

[Title omitted]

ANSWER—Filed October 30, 1924

I

Comes now the defendant and for answer to plaintiff's complaint filed herein admits that the defendant is a railroad corporation.

II

Defendant denies each and every allegation in said complaint contained not hereinbefore specifically admitted to be true.

III

Further answering defendant alleges that the plaintiff already has for the accommodation of his farm a grade crossing kept and maintained in suitable condition and under the statutes of the State he is not entitled to more than one crossing.

IV

Further answering defendant alleges that about two years ago the plaintiff made a complaint before this Commission of the same character involved in this complaint and a hear-[fol. 10] ing was had before Commissioner Cook at Warsau (Wausau), Nebraska, and the Commissioner adjudicated upon the merits of said complaint and denied the plaintiff's complaint and defendant alleges that said denial constitutes an estoppel against the plaintiff to maintain this complaint.

V

Further answering defendant alleges that the cost of installing an underground crossing as alleged in plaintiff's complaint would range from Twelve Hundred and Forty-one Dollars ($1,241.00) to Two Thousand One Hundred and Twenty-six Dollars ($2,126.00) depending upon the size of the crossing to be built and defendant alleges that under the statutes of this state plaintiff would be bound to bear the expense of such crossing or some part thereof and defendant alleges that plaintiff has not tendered nor offered to tender to the defendant any part of such expense and that such tender and security and deposit for such expense is a condition precedent to the plaintiff's right to have any order in his favor as prayed in his complaint.

Wherefore, defendant prays that the complaint be dismissed.

Chicago, St. Paul, Minneapolis and Omaha Railway Company, by (Signed) Wymer Dressler, Its Attorney.

Duly sworn to by Wymer Dressler. Jurat omitted in printing.

[fol. 11] BEFORE NEBRASKA STATE RAILWAY COMMISSION

MINUTE ENTRIES

Lincoln, Nebraska, March 9, 1925.

The Commission met in special session, all members present.

* * * * * * *

Date for hearing in re Formal Complaint No. 515, August E. Holmberg, complainant, v. Chicago, St. Paul, Minneapolis & Omaha Railway Company, defendant, was fixed for Wednesday, April 8th, at 9:30 o'clock a. m., at Wausa, Nebraska. It was directed that interested parties be notified of the time and place of such hearing.

* * * * * * *

Lincoln, Nebraska, March 14, 1925.

The Commission met in special session, all members present.

* * * * * * *

On motion, date for hearing in Formal Complaint No. 515, August E. Holmberg v. C., St. P., M. & O. Ry. Co., was advanced from Wednesday, April 8, to Tuesday, April 7, the [fol. 12] time and place of hearing remaining the same, viz., 9:30 o'clock a. m. at Wausa. It was directed that interested parties be notified of the change in date.

* * * * * * *

BEFORE NEBRASKA STATE RAILWAY COMMISSION

[Title omitted]

REPLY—Filed March 21, 1925

1. That plaintiff, August E. Holmberg, for his reply to answer of defendant, Chicago, St. Paul, Minneapolis & Omaha Railway Company on file herein, states:

2. The plaintiff denies each and every allegation of new matter alleged in defendant's answer, except what is herein expressly admitted.

3. The plaintiff denies that the expenses of building an adequate underground crossing under and through the defendant's right of way would cost the amount alleged in defendant's answer, and plaintiff alleges that a concrete culvert or tunnel, six feet in diameter would be adequate in this case and same could be constructed for less than $700.00; but whatever reasonable and additional cost required to construct same above said amount, this plaintiff is ready and willing to pay his proportionate share thereof, as required by law.

(Signed) A. E. Holmberg.

[fol. 13] *Duly sworn to by August E. Holmberg. Jurat omitted in printing.*

BEFORE NEBRASKA STATE RAILWAY COMMISSION

MINUTE ENTRY

Lincoln, Nebraska, April 7, 1925.

Pursuant to notice previously given, Commissioner Randall sat in the village of Wausa, at the hour of 9:30 o'clock a. m., for the purpose of hearing testimony in Formal Complaint No. 515, August E. Holmberg v. C., St. P., M. & O. Ry. Co., concerning a farm crossing.

The appearances were as follows:

For complainant, P. H. Peterson, attorney.

For the defendant, Wymer Dressler, attorney.

The testimony was taken in shorthand by Dale P. Stough, official reporter for the Commission, and on the conclusion the case was submitted on the record and taken under advisement.

(Signed) John E. Curtiss, Secretary.

[fol. 14] BEFORE NEBRASKA STATE RAILWAY COMMISSION

[Title omitted]

OPINION AND ORDER—May 22, 1925

By Commissioner RANDALL:

Plaintiff filed his petition asking for a hearing before the Nebraska State Railway Commission, praying for an underground crossing under the tracks of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, which tracks cross the plaintiff's quarter section farm diagonally from the southeast to the northwest corner.

Hearing was held at Wausa on the 7th day of April, 1925, the plaintiff, A. E. Holmberg, being represented by P. H. Peterson, attorney, and the defendant, Chicago, St. Paul, Minneapolis & Omaha Railway Co., by Wymer Dressler, attorney.

The evidence in this case shows that the plaintiff's residence, buildings, cattle sheds and watering facilities are all [fol. 15] located on the southwest corner of his farm, that the Chicago, St. Paul, Minneapolis & Omaha Railway Company's railroad runs across his farm from the southeast corner to the northwest corner, centrally across the quarter, that the complainant's pasture land all lies north and east of the railway right of way, and that by reason of the railroad's crossing plaintiff's farm he is compelled to drive his stock on the main highway from his corrals across the railroad track on the main highway and then to a point some distance east on the main highway to his pasture which runs across his quarter of land on the northeast side of the railroad track, that there are no watering facilities in this pasture and no other way of getting the stock to and from the pasture except around the public highway, which makes it necessary for the plaintiff to drive his stock nearly three quarters of a mile each way, which makes approximately a mile and a half each day that this stock has to be driven from the corrals to the pasture. During the pasturing season, in the warm summer months the stock has to be driven over this route during the noon hour of the day for the purpose of being watered and at night the stock has to be kept in the corral and therefore have no feed during

the night time, which causes the milch cows to shrink in their flow of milk to such an extent that it is a big damage to the complainant.

Complainant is a man about sixty years of age. He testified that the only help he has on the farm is a daughter and that it necessitated his spending a large part of his time driving his cattle to and from this pasture and that every time he is required to cross the railroad track on the public highway, it greatly endangered not only the life of the stock being driven, but also the life of the complainant or of his daughter when driving the stock across this railroad track; that he has twenty-three head of cattle at the present time, [fol. 16] and ninety head of hogs and various times during the year he has more cattle and more hogs to care for on his farm; eight head of his stock are milch cows at the present time, but if facilities for getting his stock to and from the pasture were more convenient he would keep at least fifteen head of milch cows, but owing to the milk shrinkage by reason of the milch cows having to lie in the corral all night, it is not profitable at the present time to keep more than the limited number of eight cows for milking purposes.

It was shown by the testimony that the railroad company had provided a grade crossing at a point near to the northwest corner of the quarter, but its location is such that it has never been used by the complainant for stock owing to the fact that it is situated in open fields on both sides of the right of way and is inconveniently located for the complainant, and in going to and from his land on the northeast side of the track it is not much farther to go around the main road and obviate the opening and closing of gates, and the crossing is so situated that it cannot be used for driving the cattle to and from the pasture without passing through cultivated fields for a distance of nearly a half mile.

At the point where complainant has asked for an underground pass there is a railroad grade of nine or ten feet in height, sufficiently high so that a suitable cattle pass as prayed for by the complainant could be installed without any added expense to the railroad company of right of way construction other than installing of the cattle pass. Complainant testified that he is unable at the present time to run his hogs on the east side of his farm and that it was

impractical and impossible for him to drive them around the road to the east side of his farm and thus he is unable to get any use of the land on the east side of the track so far as pasturing his hogs is concerned, but that with a stock [fol. 17] pass under the track he would be able to run the hogs on the east side of the track in his stalk fields and thereby save the waste that under the present conditions he is required to sustain; that it is his intention to fence his entire farm hog-tight so that he might turn his stock into his corn field and obviate the necessity of husking his corn, which he could not do at the present time on account of not being able to run his hogs into his field on the east side of the track.

The land used by the complainant on the east side of the track is low, soggy land and not fit for any other purposes but pasture, and the pasture extends diagonally clear across the east side of the farm parallel with the railroad track and there is quite a large cultivated field east of this pasture land which the complainant desires to run his stock in after the small grain is cut, or if into corn to run his cattle and hogs in the stalks. If the cattle pass as prayed for by the complainant is installed, complainant's stock could pass from the corral directly through under the track into the pasture and stubble and corn fields as complainant desired without being driven and could pass back to the corrals for water at any time they so desired, and in the evening after the milch cows had been milked they could go back into the pasture and feed in the night during the hot weather and fly season so that there would not be the loss to the complainant owing to shrinkage in the milk flow. It was further shown by the testimony that in case complainant was away from home during the day that it was necessary for him to hire extra help to drive the stock to and from the pasture, when if this pass was constructed as prayed for this trouble and expense would be entirely eliminated.

The defendant company filed exhibit No. 2, which shows substantially the conditions as described by the complainant [fol. 18] in his testimony as to the location of the railroad and cultivated ground, but shows that part of the land which is now contained in the pasture was used for hay meadow up to two years ago but at the present time is all used for pasture land as the complainant has increased the

number of head of stock he keeps and it became necessary to throw the entire ground into pasture in order to give him sufficient pasture land.

The defendant company filed exhibit No. 3, an itemized account showing that the cost of this 60" x 65" R. C. P. pass 36 feet long, installed would be $1,467. The defendant's exhibit No. 4 showed that a 68" x 74" R. C. P. pass 36 feet long, installed would cost $1,606. These figures are an estimate and are not the actual cost which the defendant company would be required to stand. The first $700 would be paid by the defendant company and then the amount above that would be paid for equally by the complainant and defendant company. Notwithstanding the excessive amounts shown in these exhibits, the complainant emphatically says that he would be willing to sustain his one-half of the actual expense over and above the $700 that the company would be required under the law to bear, by reason of the added convenience it would give him in the conducting of his farm and in obviating the necessity of driving his stock around the road to and from his pasture, and also that it would give him an opportunity to use the ground on the east side of the track for his hogs as well as for his cattle which at the present time he is unable to do. The complainant testified that the present grade crossing is useless to him as a stock pass and that the company can fence it up any time they desire to do so.

Section 5527, as amended by the 1923 session of the legislature, reads as follows:

"Section 5527. Land Owners to Have One Crossing.—[fol. 19] Whenever any person owns land on both sides of the right of way of any railroad, such railroad shall provide and keep in repair at least one adequate means for such land owner to cross the right of way. Any interested land owner with land on both sides of the right of way of any railroad may file written complaint with the state railway commission against any such railroad that the crossing is not adequate or is unsafe and dangerous to the life and property of those who use the same, and the commission thereupon shall make such investigation and hold such hearings as may be necessary, and shall issue such orders as it shall deem necessary, proper and adequate. If circumstances warrant the commission may require existing

crossings to be relocated so as to be safe to those who use them, but where such special crossing involves an expenditure of more than seven hundred ($700.00) dollars the land owner shall bear one-half the expense in excess of seven hundred ($700.00) dollars."

We find from the record that complainant owns the land on both sides of the right of way of defendant company; that the present crossing is inadequate and impracticable and an underground cattle pass should be constructed of sufficient size for the passage of horses, cattle and hogs under the track to and from the complainant's pasture and fields, that such a pass should be constructed by the defendant railroad company and the complainant, according to law.

Order

It is therefore ordered by the Nebraska State Railway Commission that the Chicago, St. Paul, Minneapolis and Omaha Railway Company be required to install an underground cattle pass 68" x 74" as shown by defendant's exhibit No. 4, at the place indicated on said exhibit marked "Proposed Cattle Pass," on the northwest quarter (N. W. [fol. 20] ¼) of section twenty-four (24) township twenty-nine (29) north, range two (2) west, of the sixth P. M. in Knox county, Nebraska, on or before July 20, 1925, and that the said August Holmberg be required to deposit with the Chicago, St. Paul, Minneapolis & Omaha Railway Company $453 within twenty (20) days of the date of this order, that being one-half of the estimate of the expense of said underground pass in excess of the amount required to be expended by the said Chicago, St. Paul, Minneapolis & Omaha Railway Company, in installing said cattle pass and that the said Chicago, St. Paul, Minneapolis & Omaha Railway Company shall keep a correct account of all material and labor used in the construction of the said cattle pass and shall file a copy of the account with the Nebraska State Railway Commission and furnish a copy to the complainant for checking, and if the $453 is insufficient to pay the one-half of construction over the amount required by law for the railway company to furnish in the first instance, then the said complainant shall pay whatever further sum is necessary to pay his one-half for this construction over and above the amount required by law for the company to fur-

nish. If the statement shows that the construction of said cattle pass did not cost as much as the estimate, then and in that case the said railway company shall refund to the said complainant any amount paid by him over and above the actual one-half of the cost which he had been required to pay under the law covering such cases.

Made and entered at Lincoln, Nebraska, this 22nd day of May, 1925.

Nebraska State Railway Commission. (Signed) Thorne A. Brown, Chairman.

Attest: (Signed) John E. Curtiss, Secretary. (Seal.)

[fols. 21 & 22] BEFORE NEBRASKA STATE RAILWAY COMMISSION

[Title omitted]

NOTICE OF APPEAL—Filed May 28, 1925

Notice is hereby given that the Chicago, St. Paul, Minneapolis & Omaha Railway Company will appeal to the Supreme Court of Nebraska from the order of the Commission heretofore entered in this cause on the 22nd day of May, 1925.

Dated at Omaha this 23rd day of May, 1925.

(Signed) Wymer Dressler, Attorney for Defendant.

Bond on appeal for $500.00, approved and filed May 28, 1925, omitted in printing.

[fol. 23] BEFORE NEBRASKA STATE RAILWAY COMMISSION

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed May 28, 1925

To the Secretary of the Nebraska State Railway Commission:

Please prepare a record for the appeal of this cause [fol. 24] to the Supreme Court of Nebraska and include therein the following:

I

The complaint.

II

The answer.

III

The evidence and all exhibits offered therein including the pleadings and evidence contained in the records of the Commission upon the hearing of the formal complaint in this same matter which evidence was resisted by the Commission but same should be included in this record and it should be shown that it was the evidence which was rejected by the Commission.

IV

The order of the commission in said former cause.

V

The order of the Commission in this proceeding.

VI

Notice of appeal, supersedeas bond, and fifth præcipe.
Dated this 23rd day of May, 1925.

(Signed) Wymer Dressler, Attorney for Defendant.

[fol. 25] Certificate to foregoing transcript omitted in printing.

[fols. 26 & 27] Before Nebraska State Railway Commission

[Title omitted]

Bill of Exceptions—Filed in Supreme Court July 7, 1925

[Caption omitted]

[fol. 28] August E. Holmberg, being first duly sworn as a witness in this proceeding, upon his own behalf, examined and testified as follows:

Direct examination.

By Mr. Peterson:

Q. What is your name?

By Mr. Dressler: Defendant objects to the introduction of any evidence in this case for the reason that about two years ago the same matter was tried before the Commission, and an order entered upon the merits, denying the complaint. That proceeding and order is res adjudicata; and Plaintiff is barred from again litigating the same issue.

By Commissioner Randall: The objection is overruled, for the reason that conditions at the present time have changed from what some of the conditions were at the time of the previous hearing and testimony will be received from the Complainant and his witnesses in the case.

By Mr. Peterson:

Q. What is your name?
A. August E. Holmberg.
Q. Where do you live, Mr. Holmberg?
A. I live out on the farm, this quarter section out here.

By Commissioner Randall:

Q. Will you give the number?
[fol. 29] A. The Northwest quarter of section 24.

By Mr. Peterson:

Q. It is the land described in the complaint filed in this case?

A. Yes, it is the land described in the complaint filed in this case.

Q. How many years have you lived out there?
A. I have lived there since the Spring of 1909, 16 years.
Q. How many acres does that place comprise?
A. It calls for 148 acres more or less.
Q. It is a square 160 less the amount that the Railroad takes out?
A. The Railroad takes out 11½ acres more or less.
Q. How old are you, Mr. Holmberg?
A. I will be 60 in a couple months.

A. Are you a married man?

A. I am a married man.

Q. What is your family composed of?

A. It is composed of my daughter, the rest of my children are married or away.

Q. And your wife?

A. My wife, yes.

Q. How old is your wife?

A. My wife is 59.

Q. How old is your daughter?

A. 24.

Q. What part of your farm does the Railroad, the C., St. P. M. & O. cross?

[fol. 30] A. It runs diagonally from the Southeast corner to the Northwest Corner. It misses the corner about 4 rods, I think, on the Northwest Corner.

Q. Have you buildings or residence on it?

A. All on the farm, on the Southwest Corner.

Q. About how far from the Southwest corner are the buildings?

A. About 16 rods.

Q. What are the principal buildings that you have there, just enumerate that?

A. Living House, a two story living house; barn, bouble corn crib, Granary, Machine Shed; Hog House; Cattle Shed or barn; Chicken House, and everything that a person needs on a farm.

Q. Is there any natural water supply on the farm a creek?

A. No, no natural supply.

Q. How do you get your water, pump it through a wind-mill?

A. Pump it through a wind-mill to the supply tank.

Q. Where about are the wind-mill and pump?

A. About 750 feet from the supply tank.

Q. About how far are the nearest buildings?

A. 750 feet from the building.

Q. Is there a well close by?

A. There is one right on the place, that is right down there. Well there is one well that is right by the building.

Q. The wind-mill where you get your water from, what direction is that from the building?

A. Straight North.

[fol. 31] Q. Is there any water supply on the East side of the track?

A. There is not.

Q. Is there any pasture land on the east side of the track? On the East side of the track, bottom land or what kind of land?

A. Bottom land. A No. 1 pasture, that is just fit for pasture.

Q. Why?

A. Because it overflows in the rainy season and it gets too soggy for blue grass, you can't put up blue grass.

Q. Well is there any pasture on the West side of the track?

A. No, none except what is seeded in.

Q. Well, how much do you have seeded in?

A. 6 acres, to accommodate the horses.

Q. Is that permanent or temporary pasture?

A. Well it is rather temporary. I will have to break it out and re-seed again. It will wear out.

Q. How much stock do you have on the farm?

A. That differs. I have at the present time 23 head. I used to have a good deal more.

Q. What kind of stock do you refer to by 23 head?

A. All kinds, cows, heifers, calves, steers, hogs, pigs.

Q. How many horses?

A. Four.

Q. How many hogs?

A. I have ninety at the present time. They average to about 140 head a year, on an average.

Q. Do you mean that you raise about 140 head a year?

A. Yes, sir.

Q. Do you milk cows to any extent?

A. Yes, we milk; we used to milk more than we do now.

[fol. 32] Q. How many cows are you milking now?

A. 8.

Q. How many did you used to milk?

A. I had 15.

Q. What is the reason that you cut down the number?

A. Because is is too much labor, it is too much to drive them back and forth night and morning.

Q. What do you mean by driving them back and forth; where do you have to drive them?

A. We have to drive them over the road, and we have to drive them into pasture. If I have to leave the others I have to separate them and run them down. Which is a detriment to the cattle. It is a detriment to especially those that you are milking.

Q. Where do you have to drive the cattle from, the buildings and then over to the pasture?

A. I have to drive them on the public road.

Q. Just tell the direction and distance?

A. The direction is North and East. Well it is one-half north and one quarer of a mile east to the pasture gate.

Q. Do you have to take them home for water?

A. Yes.

Q. Do you have to take them home for water and to milk?

A. Yes, to milk.

Q. And you take them home evenings to milk, where do you leave the cows over night?

A. Most of the time I leave them right in the yard at my place so I haven't any pasture at home to accommodate a bunch of cattle like that.

Q. What is the effect on milking cows when you have to drive them like you have and then keep them around some [fol. 33] buildings to pasture, that if you leave them in the yard over night, compared to conditions where you could pasture them over night?

A. It is detrimental I would say.

Q. To what extent would you say a cow would give less milk for being driven like you have to drive them than if it remained in the pasture over night?

A. About one-third.

Q. One-third as much?

A. Less.

Q. Was that the reason you had to let up or quit milking so many cows?

A. That was one of the reasons, yes sir.

Q. How do you have your farm fenced on the East side where the buildings are; is it hog tight?

A. The farm on the East side where the buildings are is hog tight.

Q. On the West side?

A. On the West side.

Q. Well how is it on the East side?

A. On the East side it is fenced with barbed wide all around.

Q. If you had an under-ground crossing so you could run your cattle from the West side to the East side would you have the other side hog tight also?

A. I sure would.

Q. What is the benefit that you would have to your farm if it was fenced off tight on both side-, to run hogs on it?

A. The first benefit would be that the hogs would have access to a number one pasture; a pasture that cannot be beat for hogs. Another thing they would take up all of the [fol. 34] loose spillings, that are left in the corn field, that always go to waste and other things of that kind.

Q. Do you hog down any corn?

A. Yes, I always hog down the corn on the West side.

Q. The West side is where it is hog tight?

A. No, the pasture and blue grass is there.

Q. What is your pasture, blue grass?

A. Well that pasture is natural pasture.

Q. It is natural pasture on the East side now.

A. The pasture, of course the hogs do better than especially they do on the old alfalfa.

Q. About how many cattle should you have on that farm to operate it in the manner in which it should be used?

A. Oh, a person can have quite a bunch. I had quite a bunch there the last time. I think I had fifty head of cattle the last time and that isn't too many.

Q. What is the reason that you haven't got that many there now?

A. Simply because it is too much trouble and bother and the cattle don't do well by running them back and forth like we have to and keeping them in the yard without feed over night.

Q. You refer to the pasture?

A. That will affect the cattle especially milk cows and the kind of stock cattle that we have. They have to go home for water and a person cannot drive them all of the time.

Q. After pasture season is over, do you use stable feed then?

A. Yes, I use stable feed. When I can't furnish that pasture I have to use stable feed but I can't do that very well for a hundred head of cattle.

[fol. 35] Q. Can you use that now the way the situation is to any advantage?

A. No, I can't.

Q. What is the reason?

A. Because I have no water over there and it is too much labor etc., to take the cattle back and forth.

Q. How do you feed your corn, or do you feed the corn in stalks, corn stalks?

A. Corn stalks or leave it there in the field.

Q. How do you feed them, do you run the cattle out in the stalks?

A. Yes.

Q. The same thing applies to water during the time that you have the cattle out there, during the pasture season?

A. Yes, sir.

Q. What is the effect on cattle when they are in the stalks or fields and do not have access to a supply of water, is it detrimental upon them?

A. Yes, it is sometimes and sometimes it will kill them.

Q. If you should handle the cattle in a successful way under the present situation that you now have, would you have to drive them back to the building for water about three times a day, morning, noon and evening?

A. Yes, sir.

Q. Have you any crossings at that place over the railroad right of way?

A. Well, there are two railroad gates there.

Q. Where abouts are they?

A. They are somewhat north of the farm, I should judge about 40 rods or so.

[fol. 36] Q. They are pretty much to the North end of your farm?

A. Yes, northwest.

Q. Can you use them for moving your stock across?

A. No, I cannot use them.

Q. Is there a suitable place to construct an underground crossing there?

A. Yes, there is.

Q. Where about is that place?

A. That is about in the center of the farm as near as I can tell.

Q. What kind of an underground crossing would you need to accommodate on that farm so that your stock could be moved from the west to the east side of the track?

A. Well, in fact I had not figured on anything but a standard 72 inch tile that the railroad company has always put in for cattle passes. Otherwise any kind would——

By Mr. Dressler:

Q. Do you mean that that would be sufficient?

A. Yes, that would be sufficient to let the cattle pass through, and horses.

By Mr. Peterson (resuming):

Q. Do — have any information as to what a tile of that kind would cost?

A. No, not reliable.

Q. What advantage would it be to your farm to have an underground crossing of that kind?

A. Oh, it would be a big advantage to me because I would not have to go and get the cattle when I wanted them at night, and I thought that when they wanted water they would come home for it, and that would be quite a big advantage, and then they would go back to the pasture again.

Q. How would you fence it so that they could come from [fol. 37] the pasture to the source or water supply?

A. I would put in an alley through connecting the little pasture at home and yards, by a cattle path. Then they could cut across the field on the West side and then this 25 acre field where there is just corn could be used if it was one field, but it is too big as just one field and too long and could be used when divided. It would improve the field.

Q. By getting that alley in there you would have a way to get back and forth?

A. Yes.

Q. How much time does it take you approximately to drive the cattle from the building to the pasture?

A. It will take an hour to drive the cattle down there and back, a good hour.

Q. You have to drive them approximately one-half mile north from the buildings?

A. Yes, sir.

Q. Then across the Railroad tracks?

A. Yes, sir.

Q. And there is a Cross Road there at the Railroad Crossing?

A. One-fourth mile East.

Q. You have to guard the cattle to keep them from going West when you are going across the track to get over to your pasture. To get over to that side?

A. Yes, sir. If we are going to keep them going into the pasture we do.

Q. How many times do you drive the cattle home in a day?

A. Well regularly twice a day except——

Q. An hour each day?

[fol. 38] A. Yes, except in the Fall when they are in the corn stalks then we have got to watch them closer and water them oftener.

Q. What trouble have you been to when you would happen to be called away from hom- in reference to getting water to your cattle?

A. Well, on Sundays if we go away we have to have a neighbor get one of his children and go down there and take the cattle home. We call on some neighbor to take them home, and water them about 6 o'clock so that we don't have to run down and get them or bring them up after dark for water.

Q. Well, that would apply to the situation on any day when you were away from home, that would apply?

A. Yes, that would apply.

Q. Is that detrimental on the stock other than the milking cows, to be driven back and forth for watering and pasturage, back and forth and then kept over night at the place?

A. Yes sir, it is detrimental to the cattle.

Q. Can you handle cattle efficiently and get any gain on them during the summer months by driving them back and forth?

A. No, you can't.

Q. You have to take all of your cattle home on account of the water?

A. Yes, sir.

Q. This pasture which you have on the East side of the track, which you have referred to, could that successfully be used and operated in any other purpose than pasture?

A. It cannot.

Q. Could it be used for hay land?

[fol. 39] A. No, it is too——

Q. Why?

A. It is too wet and soggy.

Q. What does that do?

A. The biggest part of the time we can't pull a mower over it. It is too wet and soggy and the hay isn't fit for cattle, they won't eat it.

By Commissioner Randall:

Q. Are there any trees in the pasture there?

A. No.

Q. Is there any shade for cattle at all?

A. No, none at all.

By Mr. Peterson:

Q. Have you got open sheds in the yard up near the house?

A. No.

Q. Have you any sheds up there for cattle?

A. What do you mean by open sheds?

Q. Sheds that the cattle can get under and get some shade?

A. Yes, we have two sheds for the cattle to go in after they get home.

Q. If this cattle pass should be put in could those cattle go up in the yard and get under the shade of the sheds?

A. I reckon they would if that is what you mean.

Q. Could they?

A. Yes, they could. They certainly could if they can get a place where they can go back and forth, but the way we are now we have to let them lay in the sun, and they have to lay in the sun all day.

Q. Who do you get to drive these cattle back and forth every day besides your wife, daughter and yourself?

A. I generally drive them myself.

Q. You have no smaller children?

[fol. 40] A. No, I generally do it myself.

Q. In driving those cattle back and forth you go across the crossing in the main road where your cows went this morning?

A. Yes, that is one section line.

Q. Well do you have any trouble driving back and forth there with trains coming?

A. Yes, sometimes we get into a train, sometimes into a hand car or sometimes into an automobile.

Q. I mean trains going back and forth on the Railroad, East and West?

A. Yes, sometimes trains will come up there and we have got to run ahead and chase the cows back and sometimes they get in danger there and they get stock killed.

Q. There is some danger there of getting stock killed?

A. Yes, there is, if we don't look out, but of course we try our level best to keep away from the trains, but sometime the train sneaks up and you cannot tell it is around.

Q. What about this grade crossing here, does it have some gates. Just about where is that located from where you want this underground path?

A. That is quite a distance West. You know where you drove in this morning. It is about half way from that corner where you drove in and stopped.

Q. That saves you driving the stock clear around the road, keeps you from having to drive around on the road?

A. No, not very well.

Q. Well what is the reason?

A. Because it cuts up the field so, it cuts them up so that [fol. 41] it entirely ruins them.

Q. How long have you owned this farm?

A. I have been on this farm 20 years.

Q. Have you ever had any conversation with the Railroad Company asking them to put in this underground path?

A. No, except two years when I asked for the pass and we had hearings here two years ago.

Cross-examination.

By Mr. Dressler:

Q. Now was the Railroad built when you bought the farm?

A. It was.

Q. How long has this private crossing been installed there?

A. Well I don't think I can tell you.

Q. Was it there when you bought the farm?

A. No, I don't believe it was.

Q. It has been there for ten or fifteen years?

A. It has been there for something like that.

Q. That has good gates on either side?

A. Not good gates.

Q. Well, gates.

A. You can call them gates, but they are a poor excuse of gates.

Q. The crossing planked?

A. In the Summer it is.

Q. It is usable. You can drive across there with your live stock, if you want to drive them across there, can't you?

A. We can't drive them across.

Q. You can if you want to?

A. No, not through the field.

[fol. 42] Q. Well you always have used that private crossing?

A. No, I haven't.

Q. When did you quit using it?

A. I never used that crossing except in the Winter when the snow was on. And the last year I never have had a hoof through those gates for nine months.

Q. On the East side of the track you have two corn fields?

A. The East side, yes sir.

Q. And then you have this strip of meadow?

A. Which side?

Q. The East side of the track.

A. Yes, sir.

Q. If that strip of meadow was fenced it would make a pasture?

A. Yes, sir.

Q. You didn't have it two years ago when we had the other hearing?

A. That has been there since the first year I came to the farm, 16 years ago. I put it in there myself.

Q. If you want to drive the cattle to the lots on the East side of the track all you have got to do is go through the private gate with them?

A. I can't do that.

Q. Why not?

A. It is cultivated land on both sides.

Q. There is nothing to prevent you from arranging the fields so that you can do that, is there?

A. Yes, it will ruin the fields. You understand that crossing in the first place is at the widest part of a long field on the East side. It is too close to one end.

A. What difference- are there in conditions on your farm [fol. 43] now than there were two years ago when we had the other hearing. Is there any difference in conditions?

A. Yes, there is.

Q. What are they?

A. Two years ago you people testified or said there was no permanent pasture on the East side. There is a permanent pasture and was then just as there is now.

Q. Do you have reference to this hay meadow?

A. It is not a hay meadow. It is a pasture.

Q. Two years ago it was not fenced in?

A. Yes, it was fenced in.

Q. On both sides of that strip?

A. Yes, on both sides.

Q. Well what other conditions are different. That is just the same now as it was then?

A. Yes, but it reads in the decision that they had no permanent pastures there. That is entirely wrong.

Q. Now this hay meadow and pasture, that is used only in the summer time?

A. It is used all summer.

Q. Now there is a corn field lying next to the path on the East side?

A. There was last year. It was a corn field then, this year it is a- oats field.

Q. What is the rest of the pasture there. What have you got in this year?

A. Well that field you refer to will be corn this year. Last year it was oats. There will be sweet clover. Sweet clover and oats so that if we take the oats off we can continue the pasture until in the Fall.

[fol. 44] Q. You have always taken your cattle around the public road, have you, to get them into this pasture?

A. Yes, sir.

Q. You never use the private gates?

A. Yes, in the Winter when the fields are not cultivated.

Q. When you use the fields to go across the crop you have corn stalks there, when you go through the private gate?

A. Not always.

Q. Could the private crossing be taken out?

A. You could take it out so far as I am concerned.

Q. You have no use for it at all?

A. No.

Q. Are there any other difference- in conditions now from what there were two years ago?

A. There is, but I can't think of them now.

Q. What you lay your specific complaint on now is the water proposition. What is there to prevent you from digging a well on the East side of the track and installing a wind-mill and tank?

A. That couldn't possibly be done.

Q. Well that wouldn't cost you over a hundred dollars for the whole shabang?

A. Yes, it would. The wind-mill alone is $200.00 to $300.00.

Q. It isn't that much.

A. That is a fact.

Q. Well what would it cost?

A. Well it will cost the wind-mill and wind-mill tank, when you come to get that put in you will have over $200.00.

Q. But that is low ground in the pasture and it would be very easy to reach water, wouldn't it?

[fol. 45] A. Yes it would, very easy so far as a well might be concerned except that it would also be very easy for a well to fill up against it and get an overflow of mud.

Q. Well you could dig it very easily as far as the Railroad track is concerned?

A. Yes, but I would probably have to go over there every day and pump the water, and look after the tank and wind-

mill, and a farmer don't want to do that. He can't be spending his time to do that. You have got everything to do in the Summer.

Q. Well don't you have the same labor in taking care of the wind-mill on the West side of the track.

A. No, that is connected with home. It is automatic.

Q. Well what prevents you from piping the water over there to the location on the East side of the track?

A. That cannot be done.

Q. Why?

A. Well, that cannot be done.

Q. Well it is done in some places.

A. No.

Q. Well why not pipe it from your wind-mill location to the East side of the track, it is absolutely down-hill?

A. Well it is not.

Q. Well it is down-hill.

A. Well you have got to look again.

Q. Well I have been out there.

A. Well you are way off on that. There is a rise that leads 30 feet from the Wind-mill to the Railroad track. The Railroad track is to the top of the wind-mill.

Q. You mean that the land is higher on the East side?

A. It would have to run over the Railroad track.

[fol. 46] Q. No, you couldn't put pipe over the Railroad track. You have got to put it underneath.

A. You can't dig and pipe down 30 feet from the ground, you have got to follow the surface somewhat.

Q. Well you could put a pipe through the grade at any place, it would be down hill anyway you went, if you went through the Railroad track.

A. I don't figure on any such monkey business. I don't intend to answer any such foolish talk, about any foolish business like that.

Q. The Railroad was built when you bought your farm?

A. Yes. I don't know just when the Railroad was built. I wasn't here then.

Q. Well the whole proposition as I understand it is, that you want an underground crossing there simply so you can enjoy the convenience of having your cattle and horses go over to the pasture and come back without you having to handle them?

A. Not a convenience. It is a necessity to have a place for the cattle to get to the pasture and back. You know that.

Q. But you use the pasture over East?

A. We haven't started in yet, but we will.

Q. Well you have used it for 10 or 15 years?

A. Yes, 16 years.

Q. You have used the fields when they were in corn.

A. We do in Fall, yes sir.

Q. You have done that for 10 or 15 years?

A. Yes, but we have to take the cattle around the biggest part of the farm.

[fol. 47] Q. You have got to bring them back, and then so far as the field is concerned you have got to cut your corn field before you can put your cattle into that. Now by taking them through the Railroad gate. If you have corn there?

A. Well we always have on one side or the other.

Q. Well if you have corn there, of course, it would be the same even if you had a cattle pass.

A. Well it would be usually way up in the Fall.

Q. You wouldn't use the corn fields anyway until the corn was picked.

A. Well if we have a passageway the cattle can pass there whether it is corn or alfalfa. They don't need to touch it. The idea is to get a passageway so that the cattle can go back and forth without being watched all of the time.

Q. What you propose to do is to fix a way for the cattle to get across on the East side of the track?

A. On the East side.

Q. Yes.

A. They would just cut across a narrow patch of the field and go under the Railroad, down to the pasture fence.

Q. So you mean they would go over to the pasture on the East side of the track and could come back and forth through to the home lots on the West side of the track?

A. Yes. I could put in something some place.

Q. What is to prevent you from building wings to prevent the cattle from crossing on either side and connect up there, so all that you would have to do would be to open up the gate to the Railroad track and let the animals go through?

[fol. 48] A. That would be the same thing. We have to go up now and open the gate.

Q. What it amounts to opening the gates then?

A. Yes but we have got to get an opening so the cattle can pass through without opening gates. That is what a cattle pass is needed for.

Redirect examination.

By Mr. Peterson:

Q. Now, Mr. Holmberg, suppose there was a well put in the pasture, could you leave your cows there or would you have to drive your cows home to milk then just the same?

A. We would have to drive them home to milk them just the same.

Q. That wouldn't alleviate that work or save the time it takes to drive them back and forth?

A. No, it wouldn't.

Q. The only thing that would be accomplished would be you could get the livestock and cattle back and forth, the cattle back and forth to milk and the livestock back and forth to the place without driving them around, and you could get your cattle back to milk or leave your livestock there where they could be watered?

A. Yes but that would not keep us from having to separate them.

Q. Ordinarily you would just drive the milk cows home and having water there you could leave the others there, but would you have to run the cows considerably to get them separated from the others in order to get the cows home?

[fol. 49] A. Yes sir.

Q. What is the fact in reference to the lay of the field between the buildings or where ever the water supply is and the Railroad track?

A. The water supply is between the buildings and the Railroad track.

Q. Yes.

A. Well there is a sort of a draw there. It is a draw that follows the Railroad on both sides. It is the same on the west side as it is on the East side.

Q. Isn't it a fact, Mr. Holmberg, when standing on the Railroad grade where this proposed underground crossing

is asked for, that you only barely see the top of the wind-mill and the top of the buildings?

A. Yes, you can just see the top of the wind-mill.

Q. That is because of a raise in the ground?

A. Yes, sir.

Q. There wouldn't be any natural drain down to the track from the wind-mill down to the track, would there?

A. No, sir.

Q. Now with reference to what difference there is between conditions now and those existing two years ago. You are two years older than you were two years ago?

A. I guess I am.

Q. Well do you get stronger with the years or do you happen to be going the other way?

A. No, I am going the other way.

Q. With reference to your family, you have only your daughter home at the present time?

A. Yes, sir.

Q. Are you less able to drive the cattle now than you were two years ago.

[fol. 50] By Mr. Dressler: Objected to as not a proper element of necessity. If that were true as people get older we would have to put in lots of underground passes.

By Commissioner Randall: I guess that doesn't cut any figure, as to his being able to drive them.

Q. With reference to this private crossing or putting in any cattle guards. Are there any cattle guards there to prevent the cattle from running down the track?

A. No, there is not.

Q. Then if you did drive the cattle across this crossing would that assist you or in any way lighten the work of driving the cattle in reference to what it is in driving them on the road where you take them now. Would it be much more convenient to drive them around the section line where you drive them now or to drive them right across the Railroad track?

A. I might just as well drive them over the section line.

Q. If you are forced to drive them over this private crossing and the train should be coming as you are driving the livestock over, what would be the effect as to the danger connected with that?

A. The cattle can go anywhere they take a notion to go. They are no cattle guards there.

Q. Would there by any danger of the train running into the cattle?

By Mr. Dressler: I think that would be very obvious that a grade crossing would be more dangerous than an under-
[fol. 51] ground crossing.

By Commissioner Randall: He has reference to what is the section line as being more dangerous than where the gates are.

By Mr. Holmberg:

Q. The section line has cattle guards or it is supposed to have there. They do not always have but they are supposed to keep him there so as to keep the cattle from going on the right of way.

Q. To a certain extent?

A. Yes, sir.

Q. Do they have anything like that on the private crossing?

A. No.

Q. So the cattle have a free access to go down the right of way in either direction?

A. Yes, sir.

Q. It would take more man-power to drive the cattle over the private crossing than it does to drive them across the Highway Crossing?

A. Yes, sir.

Q. That is the reason that you are using the Highway in preference to the private crossing and then the lay of the land and fields?

A. Yes, there are cultivated fields there and you can't ask a farmer to drive his cattle through cultivated fields or to build some fence so as to run the cattle back and forth through the cultivated fields.

By Commissioner Randall: How far is it from your build-
[fol. 52] ings where the well is down to the piece of ground that you use for pasture? About how many rods would it be?

By Mr. Dressler: It is about 1,000 feet according to this map.

By Mr. Holmberg: That is what I was going to say, it must be about 1,000 feet.

By Mr. Randall: That would be about one thousand feet?

A. Yes, sir.

By Mr. Randall (continued): That would be under the Railroad track, down across your field?

A. Yes, sir.

Q. That is to get into this pasture. Now if you had water running down the track or a tank down there for water so the stock would get the water, you would surely have to drive your milk cows back and forth just the same?

A. Sure I would.

Q. Just the same as if you did not have the tank there?

A. Yes, sir.

Q. Do you know what it cost the farmer approximately for stuff for piping, to lay a pipe line through there?

A. It would cost a lot of money.

Q. In your judgment how much would it cost?

A. About 25¢ for pipe, digging and filling.

By Mr. Dressler: 10¢ a foot would cover that anywhere. [fol. 53] By Mr. Holmberg: You can't get the digging done around here for 10¢. 16 years ago they got 10¢ for putting down 150 feet of pipe. It would be 10¢ or 15¢ for putting it right now. Any pipe.

By Mr. Dressler: It would be more economical to dig a well but that don't bring the milk cows home.

By Mr. Holmberg:

A. No, that don't bring the milk cows home.

By Mr. Dressler: Well the milk cows have to walk anyway you don't carry them.

By Mr. Holmberg: Well it takes time for a farmer to have to leave his work and bring the milk cows home.

By Mr. Dressler: Well if he uses pasture the cows have to walk a certain distance back and forth.

A. Yes, but they will have to come home for milk, but to have that cattle path the distance is reduced to half, you know that too.

By Mr. Randall:

Q. You say that you put in sweet clover with your small grain?

A. Yes, I always do.

Q. That makes it suitable for pasture or to cut the oats off?

A. Yes, sir.

Q. About what time do you cut your oats?

A. About the latter part of July, I think it is.

Q. You pasture that continuously until winter, do you?

A. Yes, sir.

[fol. 54] By Mr. Randall (continued):

Q. So you get half a season on the oats stubble in addition to your grass pasture?

A. I figure that you get the grass and then you get the sweet clover too.

By Mr. Peterson:

Q. How much of the year would you use this underground crossing?

By Mr. Holmberg:

A. That underground crossing would be used all of the time.

Q. But there would be no part of the year when you would have no use for it?

A. No, there isn't any part of the year that I wouldn't have use for it, unless it would be except when the snow was so deep that the cattle would have no business out, then they wouldn't need to go back and forth through it.

[fol. 55] ARTHUR HALLEEN, being duly sworn as a witness in this proceedings, and examined, testified as follows:

Direct examination.

By Mr. Peterson:

Q. Where do you live, Mr. Halleen?

A. I live just across the fence from Mr. Holmberg, on the place adjoining.

Q. On what side?

A. On the East side.

Q. How old are you?

A. 41.

Q. How long have you lived out there?

A. I have lived out there seven years.

Q. You are well acquainted with the Holmberg farm and have been with the inconveniences there, and regarding this underground crossing?

A. Yes, sir.

Q. And the lay of the land?

A. Yes, sir.

Q. You have been all over it?

A. Yes, sir.

Q. You know how Mr. Holmberg gets his milk cows, cattle and other stock from his buildings over to the pasture?

A. Yes, sir.

Q. How does he do that?

A. He drives them back and forth.

Q. On the public road?

A. Yes, on the Public Road, around the Highway.

[fol. 56] Q. Have you ever been called to assist him?

A. Yes, we have, and I have sent my boy over there several times to take the cattle home so they would be there when he got there to do his milking.

Q. What kind of a farm have you, is it the same as Mr. Holmberg's with reference to grain and stock?

A. Yes, just about the same.

Q. Do you milk cows?

A. Yes, sir.

Q. How many cows do you milk?

A. We milk about 8 and 10.

Q. Do you know about what effect it has on cows, in the amount of milk that they give if they are left in the pasture over night, without a chance to feed overnight and have to be driven three-quarters of a mile or so back and forth, and penned up in the yard over night instead of being allowed to stay in a pasture overnight?

A. Yes, there is quite a difference. You take where cows are left to run over the pasture all night and they will give about the same amount in the morning as they do at night. If you coral cattle all night they will milk about one-third less in the morning than what they do at night.

Q. Do you know the lay of the land on the Holmberg farm between the buildings and where he has his water supply on the Railroad track and his pasture?

A. Yes.

Q. What is it?

A. The pasture comes this way.

(Witness indicating.)

It is here between the pasture and the well.

[fol. 57] Q. Is there a raise of the ground?

A. There is a raise between the pasture and his well.

Q. So there would not be any natural slope?

A. There is no natural slope from the well to the pasture.

Q. Do you know what the trouble would be with reference to separation of milk cows from other cattle in case there was a well dug in the pasture. Would you still have to separate them and would there be any difficulty in separating the cattle to drive the milk cows home?

A. Yes, there would.

Q. What difficulty?

A. You would have to sort out the *cause* and chase them around and that would be just the same as running them back and forth, otherwise there would be no difference at all.

Q. Does it have any effect on stock in annoying them when you drive them if there happened to be cattle in a pasture adjoining the road where they are driven?

A. Yes, sir, there is.

Q. Do you know of any neighboring pasture?

A. There is pasture all the way down from the Railroad track on the East side to the Holmberg gate.

Q. Have you investigated the railroad grade for this proposed underground crossing *is* asked for?

A. No, I havn't.

Q. What would be the possibility of use on the grade crossing that the Railroad Company has provided for Mr. Holmberg with reference to driving his cattle from the building to the pasture?

A. I don't know just exactly where that crossing is, but [fol. 58] I think it is pretty well toward the Northwest corner of his place. To drive his cattle over there would be practically the same as driving around the road, or otherwise he would have to build a lane across their line,

and then go Northeast, or he wouldn't leave any field on either side of the lane, or there wouldn't be a field big enough so that a person could farm it, probably not over three or four acres in a field that would be left.

Q. What effect would driving the cattle up across the track have at that private crossing?

A. It would be more dangerous to leave them across there.

Q. There would be more danger from injury from a train than driving them at the crossing below?

A. The Highway has less danger. There are no cattle guards at the private crossing, and it is more dangerous than the Highway.

Q. There are no cattle guards you say at the private crossing?

A. Not any that I have seen.

Q. Do you own land on both sides of the track?

A. No, my land is all on one side of the track.

Q. These milk cows are gentle old creatures and easily handled?

A. Yes, but that practically makes no difference in their milk production.

Q. With reference to driving them back and forth, they are easily handled, and gentle, this type of animals?

A. Yes, probably they are, but that wouldn't give him any benefit in getting his milk production like he should, even if they are gentle they have to be driven back and forth anyway.

Q. Do you let your cattle run in the night?

[fol. 59] A. Yes, sir.

Q. Well they can lay down after they eat grass all day. They do lay down?

A. No, well they do most of the time. But in July and August the cattle eat a good deal at night.

Q. Well there is no use of testimony on that. Mr. Randall and I have both handled lots of cattle.

By the Witness:

A. I have, too.

By Commissioner Randall: Then he is testifying to the truth too.

Witness excused.

[fol. 60] Mr. FLOYD THORELL, being first duly sworn as a witness on behalf of Complainant in this proceeding, and examined, testified as follows:

Direct examination.

By Mr. Peterson:

Q. Where do you live, Mr. Thorell, with reference to Mr. Holmberg?

A. I live just a little better than half a mile South.

Q. You are accquainted with Mr. Holmberg and the use of his farm?

A. Yes, sir.

Q. And do you know the lay of the land?

A. Yes, sir.

Q. And do you know how he handles his cattle with reference to getting them on the East side of the Railroad right of way?

A. Yes, he drives them back and forth, which I have seen him do many times.

Q. On the public road?

A. Yes, sir.

Q. Is that the best accessible way for him to get them from the buildings to the pasture?

A. Yes, I would say it is the easiest way that he could get them over there, to drive the cattle.

Q. Where is the pasture, on the East side?

A. Yes, sir.

Q. How many years have you been farming there?

A. I have been there eight years, down there farm for myself. I have lived down in there all of my life as far as that goes.

[fol. 61] Q. What is the fact as to Mr. Holmberg being able to use his ground there for stock at practically all times of the year?

A. Well it is pretty hard for him the way it is. He can't hardly keep pasturage for stock and cattle without driving them back forth. Another thing is that they ought to have, of course over there, a lot of hogs and do quite a lot of feeding, but it is impossible to get them there the way it is.

Q. It is impossible for him to drive hogs like he drives cattle?

A. Yes, it is practically impossible.

Q. If he would put in and feed hogs in the oats stubble could he get more use out of that?

A. Yes that would be better if he could.

Q. How would that help?

A. Well that would help to use the stubble field that way. Farmers do that more now and pretty nearly every farmer around here does.

Q. How about the corn field, to what extent do you get stock feed out of that?

A. We get pretty good feed after we turned the cattle in, after the corn is out, and we get mostly hogs, they should follow the cattle.

Q. What is the effect of cattle requiring an extra amount of water when in the corn stalks and whether they are liable to get sick and die unless they have plenty of water?

A. There is a lot of danger in that. I have had experience in that myself. We have lost cattle that way, by their [fol. 62] going into the corn field and filling up on stalks and if they get no water for six or eight hours they are pretty apt to be dead critters, if they are not taken care of real soon.

Q. If they have access to water there is not so much danger?

A. There is not nearly so much danger.

Q. If he handles his cattle successfully in the corn field it would require him to drive them to water in the middle of the day as well as just morning and evening?

A. Yes, sir, it would. They would have to have water at least three times a day when they are in the corn stalks.

Q. You did not notice whether there was a rise in the ground between where his building- are and where his pasture is?

A. Yes, there is considerably rise where the Railroad runs. The wall is down quite a bit lower than the Railroad, and so is his pasture on the other side of the Railroad.

Cross-examination.

By Mr. Dressler:

Q. You mean the pasture on the east side of the tract is lower than the Railroad track?

A. Yes, sir.

Q. And the buildings are lower down than the Railroad tracks?

A. Well, yes, they are quite a bit lower than the Railroad tracks.

Q. Where from the house?

A. Well I would say that it is quite a bit lower.

Q. Where he wants this underground crossing is a natural draw right down to the place where this crossing would be?

[fol. 63] A. Well some.

Q. The whole pasture down to the Railroad track where he wants this underground crossing, is that all down hill?

A. Well I don't know that that is.

Q. Well it is practically all down hill?

A. I doubt that.

Q. Mr. Holmberg's situation is not any different than every farmer has who works fields on both sides of the Railroad track, is it?

A. It is in a way. He wants to have an underground crossing to get his milk cows over.

Q. Well every farmer who works land on both sides of the track and happens to have a pasture on one side, with the farm buildings on the other side is in the same situation that Mr. Holmberg is?

A. I suppose he would be.

Q. There would not be anything peculiar about Mr. Holmberg's situation?

A. Well I wouldn't say that. I wouldn't say that there is.

By Mr. Peterson:

Q. If somebody else lived on the same farm it would be identically the same?

A. I would say it would.

Q. Farms are like persons, there are no two farms alike and persons are not identically alike, there are no two farms identical?

A. Yes.

By Mr. Randall:

Q. If you were living on that farm where Mr. Holmberg is, and the conditions were just exactly as they are with

[fol. 64] him, the pasture being on the east side of the track and a large percentage of cultivated land on the east side of the track, would you deem it necessary to have an underground passage for the stock, so the stock could pass back and forth under the track or to and from the pasture?

A. I certainly would. It is absolutely necessary at that place if they are to have pasture.

By Mr. Dressler:

Q. Then you say it would be absolutely necessary for every farmer who had land on both sides of the track and wanted to do the same thing that Mr. Holmberg does?

A. Yes, I said it would, if you had pasture away from home that way.

By Commissioner Randall:

Q. If you wanted to handle hogs with the cattle in the corn field, you can't drive hogs the way you do cattle?

A. No, you cannot.

Q. Their heads are on the wrong end?

A. Yes.

Q. If you want to run cattle and hogs together on a field, or run hogs on a sweet clover field it would be necessary in this instance to have an underground passage?

A. Yes, sir, it would. No farmer can hardly afford to let the hogs stay out of the field any more.

[fol. 65] Mr. A. D. Nelson, being duly sworn as a witness on behalf of Complainant, and examined, testified as follows:

Direct examination.

By Mr. Peterson:

Q. What is your name?

A. A. D. Nelson.

Q. Where do you live, where is your farm with reference to Mr. Holmberg's farm?

A. West of his farm.

Q. It joins on the West?

A. The section line is all that is between us.

Q. Now just go ahead, Mr. Nelson and state in your own words, the situation and condition of Mr. Holmberg's farm that would make it a matter of necessity for him to have an underground crossing?

A. Well, in the first place, I think that by taking his cattle forth and back it is detrimental to the farmer. In the first place, especially in the milk cows, we know who have had experience, that if you are going to chase milk cows forth and back like Mr. Holmberg does, you will have quite a bit less milk.

In the same way, we have stock cattle. We who keep out stock cattle to put a little flesh on them during the summer, know that you don't have a chance if they are in a pasture and you drive them home, you don't have a chance for them to get filled up and it is necessary to drive them. It will take him at least an hour every time morning and night to chase them forth and back, and then we are getting [fol. 66] to stock our corn stalks quite a bit or hog them rather. Therefore, it rather looks to me like an underground crossing is necessary so he don't have to drive them forth and back and then he don't have hogs to follow in these conditions. The pasture what he has got is good for nothing but pasture and it would be very good for hog pasture. I think he should have an underground crossing so the hogs could follow the cows a good deal. Then he should have them for trade. There are no sheds or shelter down there. Then if on account of hail or storm coming up they would naturally go home to the sheds if they had a way to do so.

Q. What would be the fact in reference to sheds in the winter time when you are speaking of cattle in the corn stalks etc. Suppose he had his cattle on the stalks and a storm come up, what would be the difference if he had an underground crossing than what he has in getting out of the storm, rather than his trying to go out in the storm and drive them home?

By Mr. Dressler: I think it is very obvious that they would come home if they wanted to, otherwise he would come after them.

A. If they have been used to coming home they would just naturally come home if they had a way to do it.

Q. Would there be any danger if a storm came on of there being any difficulty in driving them home or losing any of the cattle?

By Mr. Dressler: I object to that as it is obvious. We don't have hail storms in here very often.

[fol. 67] By the Witness: Well we have some. We have had some real hard ones and when there is one you don't want to start out after them. You would almost rather take chances on the storm rather than go out.

By Mr. Peterson:

Q. In reference to driving the cattle back and forth, is there any annoyance to the cattle when they are on the other side of the fence along the road?

A. Yes, there is a good deal. A couple years ago we had a pasture right on the side of the road and we had a bull there. Holmberg came along with his cows along the road. And when his cows went along our bull had jumped the fence into his cows. It would be the same way if he had a bull, among his herd, his bull would just naturally jump the fence into our stock.

By Mr. Dressler: That would be proper conduct for a bull.

By the Witness: It sure is. But they should stay outside of the fence when they are bringing them along.

Q. Holmberg usually keeps a bull with his cows?

A. He generally does.

Cross-examination.

By Mr. Dressler:

Q. You have land on both sides of the track?

A. I do, I have land on both sides of the track but I don't pay any attention to it.

Q. You don't ask for an underground crossing too?

[fol. 68] A. I don't need one.

Q. You have got one?

A. No, I just give that land to the Railroad Company to use if they want it.

Q. Well you don't need one?

A. No.

By Commissioner Randall:

Q. As a practical thing, with a farm where the Railroad cuts it up as it does Mr. Holmberg's there, with his buildings, his well and wind-mill on one side of the track and his pasture and a large percentage of the cultivated land on the other side of the track, would it be a practical and sensible thing to have an underground passage so the stock could go back and forth for water, and so Mr. Holmberg would not have to drive his stock from the place to the pasture as he does at the present time?

By Mr. Dressler: We object to that on the ground that whatever inconvenience may be involved on account of the Railroad separating this farm the Railroad paid for all of that when they bought the right of way, and they should not be expected to pay for it again.

(Question re-read.)

A. Yes, sir.

By the Commissioner: The objection is overruled.

Exception.

A. Yes, sir.

Plaintiff rests.

[fol. 69] Defendant's Case

Offers in Evidence

Mr. O. J. Skooglund, being first duly sworn as a witness in this proceeding on behalf of Defendant, and examined, testified as follows:

By Mr. Dressler: I want to ask to have identified as Exhibit One, the Complaint, the Pleadings, answer and reply, and the Decision in the Formal Complaint 447, and the evidence in that case.

By Mr. Dressler: I want to offer in evidence at this time, Exhibit One, the complete record of the other hearing held two years ago on the Complaint of Mr. Holmberg, which record should include the complaint, answer, evidence and order of the Commission.

By Mr. Peterson: I will object to that as incompetent, immaterial and irrelevant.

By Commissioner Randall: The objection to the offer of the original records will be sustained.

By Mr. Dressler: I wrote to Mr. Curtiss, the Secretary of the Commission requesting him to have Mr. Randall bring with him that record.

By Mr. Randall: It is right here. But the original records will not be received as an exhibit in this case.

By Mr. Dressler: I assume that the Commission will take [fol. 70] judicial notice of that record.

By Commissioner Randall: But it must be understood that this is not a continuance of that hearing. This is a separate and distinct complaint. There is no connection between this testimony presented here and the testimony presented at that time.

By Mr. Dressler: Well I want to make them a part of this case by offering them in evidence, so I desire to offer them in evidence and I will make an offer. If the Commission rejects the offer that is another matter.

By Commissioner Randall: Go ahead.

By Mr. Dressler: I will offer in evidence *as* a complete record of the Commission in Formal Complaint 447, being the case of August E. Holmberg, Complainant, vs. C., St. P., M. & O. Railroad Company, Defendant, which was filed March 29th, 1922, and upon which an order there was entered upon July 25th, 1922. I will offer all of the pleadings, the record of the evidence, and the Order or Decision of the Commission, and I will offer that for the purpose of showing that the whole issue in this Complaint is res adjudicata.

By Mr. Peterson: It is objected to as incompetent, immaterial and irrelevant, there is no proper foundation laid for its introduction.

By Commissioner Randall: The objection to the exhibit as evidence will be sustained. The exhibit cannot be offered by the original records but copies of them will have

[fol. 71] to be furnished by the Defendant if it desires that to be a part of the record in this case.

(The copies of documents comprising exhibit one, to wit: Complaint, Answer, Reply and any other pleadings; and transcript of the evidence and order of the Commission in said Formal Complaint 447, will not be incorporated at this point but said Exhibit one will be incorporated as a part of this record at the end of the evidence in this case, to wit, on pages — to — of the record in this instant case.—Reporter.)

By Mr. Dressler (in direct examination of Mr. Skooglund):

Q. Now, Mr. Skooglund, you are Assistant Engineer of Defendant Company?

A. Yes, sir.

Q. Did you go to the location where Mr. Holmberg desires a crossing installed and make a survey of the situation there?

A. Yes, I did.

Q. Do you have a blue print of that?

A. Yes.

(Reporter marks a blue print as Exhibit 2.)

Q. Is the Blue Print which is now marked Exhibit Two the one you refer to?

A. Yes, that is it.

Q. Is that a correct survey showing the location of the various fields, the buildings, fences, private crossing, and the location where Mr. Holmberg says that he wants this underground crossing?

A. Yes, sir.

[fol. 72] By Mr. Dressler: We now offer Exhibit Two in evidence.

By Mr. Peterson: I would like to cross examin*ation* upon that, may I do so?

Cross-examination on Exhibit Two.

By Mr. Peterson:

Q. Is this a correct survey of the fields, this line shown on here (Counsel indicating to witness)?

A. That is the fence line from the pastures.

Q. You mean this fence line along this pasture runs straight like that line, do you mean the fence runs straight like that line?

A. It runs straight between those points.

Q. That is clear across the farm?

A. Yes, sir.

Q. Do you mean to say there is no deviation any farther than what it shows on the East and North side of that pasture?

A. Well, there is not any considerable deviation. It is a straight line right across there.

Q. This field marked "Hay Meadow" here, is that just as correct as any other part of the map?

A. Yes, sir.

By Commissioner Randall:

Q. Let me ask you — part marked "Hay Meadow" is that a meadow?

A. Why, there is a hay stack there, or there was. He had a hay stack there. Mr. Holmberg told me that he had hay there, that he had hay in this piece in here (Witness indicating). He had a hay stack there.

By Mr. Dressler:

[fol. 73] Q. About two or three weeks ago, now, on March 23, 1925.

By Commissioner Randall:

Q. Did you make a survey to know how many acres was in each one of the particular pieces, where you had marked hay meadow and pasture?

A. Well a fence here, it shows a fence line.

Q. Well I mean the number of acres?

A. No.

Q. Well you don't know then?

A. Approximately 15 acres.

By Commissioner Randall: This Exhibit will be received in evidence as it is the only plat that we have here of it.

(Exhibit Three is as follows, to-wit.)

(Here follows exhibit, marked side folio page 74)

MAP IS TOO LARGE TO BE FILMED.

[fol. 75] Direct examination.

By Mr. Dressler:

Q. Is the location of the private crossing here properly indicated with reference to the outlines of the farm?

A. Yes, it is.

Q. Is that private crossing in good condition or usable condition?

A. Yes, it is in the same condition that farm crossings are generally in.

Q. It has gates and the fences on the right of way, either wood or steel gates?

A. Yes, sir.

Q. Are the gates in good shape?

A. Yes, sir.

Q. Is the crossing planked?

A. Yes, sir, it is a standard farm crossing.

Q. You didn't make an estimate of the cost?

A. No, I didn't.

Cross-examination.

By Mr. Peterson:

Q. When did you make this survey?

A. March 23, 1925.

Q. Did you make a thorough survey?

A. Yes, sir.

Q. Did you say that you found a hay stack in what you marked as the "Hay Meadow?"

A. I said that Mr. Holmberg said he had a hay stack [fol. 76] there. It was fenced in and appeared to be a hay meadow. I said Mr. Holmberg said that he had a hay stack there. I asked him if it was a hay meadow and he said it was.

Q. Well did you examine it personally?

A. No, but I know that there was a hay stack in there. There wasn't any hay stack in there that day. If there had been I would have seen it. But I think there had been a hay stack there though there was no hay stack there that day.

Q. This may have had the appearance to you of being a hay meadow? Did it appear to you to be a hay meadow or a pasture?

A. Well I am not a farmer but I believe that I could tell whether it was a meadow or a pasture. I believe that I could tell whether a piece of ground was a pasture or hay land, or cultivated field.

Q. You think you could tell whether it was hay land or a cultivated field?

A. Sure, yes.

Q. Well which was this?

A. I don't think it was either when I was there, it was just a field, there were no cattle there, so it wasn't a pasture, though I couldn't see any hay.

Q. It was fenced around?

A. Yes, there was a fence around it.

Q. Well did it give any indications of having been used as a pasture in the last year?

A. I could not say. I could not see any cattle there.

Q. Did you ask Mr. Holmberg whether it was a pasture or a meadow?

[fol. 77] A. I asked him if there had been a hay stack there. I think he said there had been hay in there in the last year. I forget the reason why he gave.

Q. Well you are not capable of saying whether there was a hay meadow or a pasture?

A. Well I don't know. I think it was a hay meadow, and a pasture at the same time. I think it could be used for either.

Q. But what the difference is between the two you don't exactly know, or could you tell from your observation and examination and determine whether it would be a hay meadow or a pasture?

A. Mr. Holmberg told me it was a hay meadow and that is why I marked it that way.

Q. That is the reason that you marked it as a hay meadow?

A. Yes, sir.

Q. Did you actually survey the line marked on here or did you just make an estimate from observation?

A. I measured it with a steel tape, and went all around the farm.

Q. You are positive that the lines defined as meadow and pasture were just - correct as any part of this map that you made?

A. Yes. sir.

[fol. 78] Mr. R. R. STROTHER, being duly sworn as a witness in this proceeding on behalf of the Defendant, and examined, testified as follow*ing*, towit:

Direct examination.

By Mr. Dressler:

Q. What is your name?
A. R. R. Strother.
Q. You are Assistant Engineer of the Defendant Company?
A. I am.
Q. I will ask you if you have prepared and brought with you an estimate of the cost of the various types of underground crossings, concrete pipe underground crossings?
A. I have.
Q. Will you produce them?
A. Yes. There are three classes or types included in the three estimates.

(Reporter identifies Exhibit Three, being the $1,467 estimate.)
(Reporter identifies Exhibit Four, being the $1,606 estimate.)
(Reporter identifies Exhibit Five, being $1,845 estimate.)

Q. What is Exhibit Three?
A. Exhibit Three is an estimate for 60 by 65 inches reinforced concrete pipe, 36 foot long.
Q. Is that the length of pipe that would be required in an underground crossing at the location requested by Mr. Holmberg?
A. Approximately so.
[fol. 79] Q. What is the cost installed of such an underground crossing at such a location?
A. The estimated cost is $1,467.
Q. Is that estimate approximately correct?
A. Approximately so.

By Mr. Dressler: We now offer in evidence Exhibit Three.
By Commissioner Randall: It will be received in evidence.

(Exhibit Three is in word- and figures as follows, towit:)

[fol. 80] EXHIBIT No. 3

60" x 65" R. C. P. 36' Long

Engineering		25	
Contgy.		3	
			28
Falsework— 1 Span P. B. 14' Long			
8—16' Tamarack Piling 128 Lin. Ft.	.25	32	
2—12" x 14"—14' Usa. Caps 392' B. M.			
6— 8" x 16"—14' " Stringers			
8⅔' B. M.			
13—6" x 8"—10' Usa. ties 520' B. M.			
2—3" x 10"—14' " Guard			
Timbers 70' B. M.			
10—4" x 6"—4' Usa. Mud Bent 80' "			
6—8" x 16"—16' " " " 1024' "			
2982' B. M.	20.00	60	
175—Lbs. Hardware	.04	7	
Store Expense		8	
Transportation		37	
Labor Unloading & Driving Piles		40	
Labor Framing Bridge		50	
Work Train Service		140	
Contgy.		19	
			393
15—Cu. Yds. Rip Rap		9	
36—Lin. Ft. 60" R. C. P.	8.45	304	
Store Expenses		2	
Transportation		226	
Labor Unloading & Placing Pipe		144	
Labor Placing Rip Rap		30	
Contgy. 5%		36	
			751
Excavation 175 Cu. Yds.	.75	131	
Backfilling 140 " "	.50	70	
Removing Falsework.		50	
Contgy. 5%		13	
			264
Wing Fences as per previous estimate			41
			1,477

Salvage 1757′ B. M. Usa. Stringers, Ties & Mud Bent	15.00	26	
Less Transportation		16	
		——	Cr 10
Net Cost			$1,467

Ex. 3. Dale P. Stough, Wausa, 4/7/25.

[fol. 81] Direct examination.

By Mr. Dressler:

Q. What is Exhibit Four

A. Exhibit Four is an estimate of a 68 inch by 74 inch reenforced Concrete Pipe, 36 foot long.

Q. What is the estimate cost of such an underground crossing at that place?

A. $1,606.00.

Q. Is that estimate reasonably correct?

A. It is.

Q. What is Exhibit Five?

A. Exhibit Five is an estimate of an 84 by 89 inch reenforced concrete pipe, 36 foot long.

Q. Is that a reasonably correct estimate?

A. Yes, sir.

Q. What would it cost?

A. $1,845.00.

Q. Why have you selected those particular sizes of pipe for your estimate?

A. Because those are the sized used in cattle passes.

By Mr. Dressler: We now offer in evidence Exhibit Four and Five.

By Commissioner Randall: All three of these exhibits will be received subject to checking by the Railway Commission's Engineer, as to the correctness of the estimated costs.

By Mr. Dressler: Of course, if the Railway Commission's Engineer has anything to say as to the estimates we want [fol. 82] an opportunity to cross examine him.

By Commissioner Randall: You will have that opportunity and you will be served with a copy of the estimate if there is a difference and then an opportunity will be given

to question him. A copy will also be provided for Mr. Peterson.

By Mr. Dressler:

Q The details of the estimated costs are shown on these three exhibits?

A. The details are shown.

(Exhibits four and five having been received, are as follows, to-wit:)

[fol. 83] EXHIBIT No. 4

68" x 74" R. C. P. 36' Long

Engineering		25	
Contgy.		3	
		—	28
Falsework as per details in 60" x 65" R. C. P. Estimate			393
15—Cu. Yds. Rip Rap		9	
36—Lin. Feet 68" R. C. P.	10.55	380	
Store Expense		2	
Transportation		285	
Labor Unloading & Placing Pipe		144	
Labor Placing Rip Rap		30	
Contgy. 5%		43	
		—	893
Excavation 175 Cu. Yds.	.75	131	
Backfilling 135 " "	.50	68	
Removing Falsework		50	
Contgy. 5%		12	
		—	261
Wing Fences as per previous estimate			41
			1,616
Salvage 1757' B. M. Usa. Stringers, Ties & Mud Bents	15.00	26	
Less Transportation		16	
		—	Cr 10
Net Cost	68 x 74		$1,606

Ex. 4. Dale P. Stough, Wausa, 4/7/25.

[fol. 84] EXHIBIT No. 5

84" x 89" R. C. P. 36' Long

Engineering		25	
Contgy.		3	
		—	28
Falsework as per details in 60" x 65" R. C. P. Estimate			393
15—Cu. Yds. Rip Rap		9	
36—Lineal Feet 84" R. C. P.	14.50	522	
Store Expenses		3	
Transportation		364	
Labor Unloading & Placing Pipe		144	
Labor Placing Rip Rap		30	
Contgy. 5%		54	
		—	1,126
Excavation 185 Cu. Yds.	.75	139	
Backfilling 130 " "	.50	65	
Removing Falsework		50	
Contgy.		13	
		—	267
Wing Fences as per previous estimate			41
			1,855
Salvage 1757' B. M. Usa. Stringers, Ties & Mud Bents	15.00	26	
Less Transportation		16	
		—	Cr 10
Net Cost 84 x 89" R. C. P.			$1,845

Ex. 5. Dale P. Stough, Wausa, 4/7/25.

[fol. 85] Cross-examination.

By Mr. Peterson:

Q. Where do you figure those costs from?

A. We figure the cost as shown here to be the cost of placing that pipe in the location as desired by Mr. Holmberg. We figure the pipe will be purchased at Minneapolis. The false-work will come from Emerson.

Q. What do you figure the cost of this pipe to be at Minneapolis per foot?

A. The 60 by 65 foot pipe is figure at $8.45 per foot. The 68 by 74 inch pipe is figured at $10.55 per foot. The 84 by 89 inch pipe is figured at $14.50 per foot.

Q. Do you manufacture them yourselves or buy them?

A. We buy them.

Q. Then you have figured the original cost with the transportation from Minneapolis to here?

A. Yes, from Minneapolis to here.

Q. What would be the nature of other work that you estimate for putting it in?

A. In each case it would be necessary to install false-work to carry our track while the pipe is being placed.

Q. What would be the estimated cost of that?

A. The estimated cost of the false-work is $393.00.

By Mr. Dressler:

Q. For each pipe?

A. Yes, sir.

Q. The false-work would be the same regardless of the size of the pipe?

A. Yes, sir.

[fol. 86] Cross-examination.

By Mr. Peterson (resuming):

Q. What would be the principal item of cost in this false-work?

A. There would be the tiling, the caps, springers, guide-rails, and ties.

Q. What do you figure on using for abutments on the pipe or at the end of the pipe. How do you figure that?

A. We figure that would be rip-rap.

By Mr. Dressler:

Q. Drop tile there?

A. Yes, sir.

By Mr. Peterson:

Q. Do you put concrete over or above this underground tunnel pipe or do you just put the track on top and fill in the outside?

A. Well we fill in the outside places between the pipe and the track, and whatever is necessary from the excavation.

Q. You fill it in back up to the treval to take care of the tracks?

A. Yes.

Q. You use the same dirt that you excavated out?

A. Yes, sir.

Q. These are just estimates as to the cost of all of these different items?

A. Yes, sir.

Q. It is based on your own experience?

A. Well it is based on our knowledge at the average cost of the same class of work. It is figured on the average [fol. 87] work that we have done, or that has been done in late years. We have done this sort of work.

Q. Have you put in any other crossings in Northeast, Nebraska?

A. Not that I know of, in northeast Nebraska. We have cattle passes put in in lots of cases with the same size of pipe where it was a drainage proposition. The cost is no difference whether it is used for cattle pass. It wouldn't vary with the cost whether it was used for a cattle pass or used for drainage purposes.

By Mr. Dressler:

Q. Those estimates are prepared on current prices for materials?

A. Yes, sir.

Defendant rests.

[fol. 88] Plaintiff Case Upon Rebuttal

Mr. August E. Holmberg, being recalled to the stand for rebuttal, testified as follows:

Direct examination.

By Mr. Peterson:

Q. Handing you this paper which is marked Exhibit Two by the Reporter, I will ask you if that gives a correct outline or survey of your farm?

A. Well it seems to me to give a pretty good outline, although to my mind those fences are straighter than they are here.

By Commissioner Randall:

Q. Will you indicate what fences?
A. The fences that takes in the pasture land.

By Mr. Dressler:

Q. On the east side of the track?
A. Well I don't think that looks quite that straight. The outline on that is not as near correct.

By Mr. Dressler:

Q. But the fields are properly divided?
A. Yes, except that it seems to me that this field is a longer field as it runs along the railroad.

By Commissioner Randall:

Q. That open field next to the railroad track, on the east side of the railroad track is what?
A. It ought to be a little straighter at this end. It seems the way the pasture is here it seems too narrow at this end. Otherwise the outline is all right.

By Mr. Peterson:

[fol. 89] Q. Did you see Mr. Skooglund, the man who made this map, while he was out there and have a talk with him?
A. Yes, sir.
Q. Did you tell him that part of this field marked, "Hay Meadow" was a hay meadow?
A. No, I did not tell him it was a hay meadow. I told him why I had a hay stack there, I told him that I had too much of that. I didn't have cattle enough to consume all of the grass, so part of it was fenced in on that pasture. Then the hay got rank up there and I didn't want to leave it in the field so I put it up, that is I laid it down in hay, laid it down so I told Mr. Skooglund that there had been a hay stack there. I had cut it up and then stacked it.

By Mr. Peterson:

Q. He asked you if this was correct, and you said it was. What are the facts as to this being a correct plat, showing the hay meadow, and fence lands straight across there?

A. Those fences do not run straight. They are abgles to those fences, both of them. I know that. They don't run straight across. One of them I guess has got an angle in it.

By Commissioner Randall:

Q. How many acres is there in that place altogether?

A. I don't know exactly.

Q. Well give an estimate.

A. Well I would estimate it to be between 15 and 18 acres.

Q. That is the pasture?

A. Yes, there is an angle in that on account of the railroad going through. There is no square end of it any place there.

[fol. 90] By Mr. Dressler:

Q. This blue print is all on a scale of 400 feet to the inch. Being on such a small scale the angles of the fences would not show up very much on the map?

A. Yes, sir.

By Commissioner Randall:

Q. This yellow line shown from the railroad fence, under the right of way, and marked "Proposed Cattle Lane" how does that mark come to be there?

A. Maybe Mr. Skooglund can tell, I know I couldn't.

Q. Is that the place that you propose that these pipes should be put in?

A. Yes, that line. It would be put right straight across there.

By Commissioner Randall:

Q. It would go straight northeast?

By Mr. Dressler:

Q. The location of where you want this underground crossing is so indicated on the blue print?

A. Yes, sir.

Q. You would not need to build a Cattle Lane exactly as shown here?

A. Well I ran that line down to here that would show the contemplated change across the center of the pasture if it was run there. He made that. I had nothing to do with that.

Q. All the purposes drawing those lines was to indicate how you expected to reach the underground passage?

A. Yes, he ran that there.

By Mr. Peterson:

Q. These lines indicated hay meadow on the — is that a hay meadow?

[fol. 91] A. No, that is not a hay meadow.

Q. Is any part of that field a hay meadow?

A. No, it is not.

Q. Could it be successfully used for a hay meadow?

A. No, it can't.

Q. Why?

A. Because it is too wet and the hay would all spoil.

Q. What is the nature of the grass in that field?

A. Blue grass. That is most of the grass is blue grass. You know that that don't make any hay.

Q. So it is pasture, the whole field, regardless of its being marked hay meadow on here?

A. Yes.

Q. If a person doesn't know that that is a pasture they wouldn't know about it. It cannot be checked.

Q. Well that is the reason that you don't have enough cattle for that pasture?

A. Because it is too much trouble to have them taken back and forth and then to stay in the yard over night.

Q. If you had an underground crossing would you use the pasture every year?

A. Yes, sir.

Q. That would be except for only the time it is not fit to use?

A. Yes except for the time it is not fit to use.

By Commissioner Randall:

Q. Do you think a 65-inch concrete pipe there would be large enough to take care of your stock?

A. A 72 inch.

Q. Well the nearest to that is 74, that is 68 x 74?

[fol. 92] A. Well it is pretty small the 68 it should be 72.

By Commissioner Randall: This other is 60 by 65.

A. Well I though- that it was circular.

Q. They are both oval.

A. Well 74 inch would be a proper size. 74 inch would be so a horse could go through that.

By Commissioner Randall:

Q. Now, Mr. Holmberg, the estimated amount of a 60 by 65 inch re-enforced concrete passage is $1,467 installed. You should know that the railroad company, under the law, have to put up for $700.00 worth of that. After that the cost is divided fifty-fifty. That is the applicant would have to pay one-half and the Railroad Company would stand one-half. That size of a pipe as the railroad company have estimated it would cost you $383.33, if that were the exact cost of it. Now, in case that the Commission should order the Railroad Company to put in this pipe, it would be necessary for you to deposit with the Railroad Company $383.33?

A. Yes, sir.

Q. And after the pipe was put in the Railroad Company would render a correct statement of all materials, supplies, labor and cost, and if they found that it does not cost that much they would make a refund to you from this amount of $383.33, being whatever one-half of the difference figured; but if they found that it cost more than that it would be necessary for you to pay the additional amount, whatever that happened to be?

A. Yes, sir.

[fol. 93] Q. Are you willing to make that payment?

A. Yes, sir.

Q. Now if the size was 68 by 74 inch- the same condition exists but the charge for payment or deposit that you would pay would be $453.00. That is, in case the Railway Commission should find that you are entitled to a pipe of that size, are you willing to deposit that $453.00 with the Railway Company.

A. Yes, sir.

Q. Subject to what it actually costs after it was put in and either you received a refund, or make the additional payment?

A. Yes, sir.

By Mr. Peterson:

Q. What are the facts in reference to the smaller size being large enough for you? Wouldn't that accommodate your cattle and hogs in the 65 inch size?

A. It might accommodate the cattle and hogs but I would rather have the other.

Q. Would you rather pay the difference and have the larger size?

A. I would rather pay the difference because I could get horses through that too.

By Mr. Peterson:

Q. You would prefer to have the 74 inch and pay the difference?

A. Yes, sir.

(Case submitted and taken under advisement, with Exhibits to be kept by the Engineer of the Commission and copies of Exhibit one should be furnished by Defendant if desired for the record.)

[fol. 94] EXHIBIT No. 1

Received Mar. 29, 1922. Nebr. State Ry. Commission

BEFORE STATE RAILWAY COMMISSION OF NEBRASKA

In the Matter of Application of AUGUST E. HOLMBERG, of Wausa, Nebraska

APPLICATION FOR UNDERGROUND CROSSING OVER RAILWAY TRACK

Comes now applicant, August E. Holmberg, and respectfully represents to this Honorable Commission, that he is a farmer by occupation, and resides on his farm described as follows: Northwest quarter (N. W. ¼) of Section

Twenty-four (24) Township Twenty-nine (29), North, Range Two (2), West of the Sixth Principal Meridian, in Knox County, Nebraska.

That the Chicago, St. Paul, Minneapolis and Omaha Railway right of way, crosses the abeve described land, and divides same so that your applicant has land on both sides of said right of way; that it is very inconvenient for your applicant to transfer cattle and stock from one side of track to the other, and the land is so situated that an underground crossing could be made and established, as prescribed and contemplated by Section 4 of Chapter 261 of the laws of Nebraska, as passed by Legislature 1921, of the State of Nebraska.

Your petitioner therefore prays that your Honorable Board may investigate this matter and call a hearing hereon, if necessary, and upon proper proof that said railway company be required and ordered to construct said underground crossing and making a cattle runway under said railroad track. All of which is respectfully submitted.

Dated this 25th day of March, 1922.

(Signed) August E. Holmberg, Applicant.

[fol. 95] Received Apr. 5, 1922. Nebr. State Ry. Commission

BEFORE STATE RAILWAY COMMISSION OF NEBRASKA

F. C. 447

In the Matter of the Application of AUGUST E. HOLMBERG

AMENDED COMPLAINT

Comes now the petitioner, August E. Holmberg and complains against the Chicago, St. Paul, Minneapolis and Omaha Railway Company, and for his amended complaint alleges the facts to be:

1. That your petitioner is a farmer by occupation and resides upon the following described farm, to-wit: Northwest Quarter (N. W. ¼) of Section Twenty-four (24) Township twenty-nine (29) North, Range Two (2), West of Sixth Principal Meridian, in Knox County, Nebraska, which

he owns by title in fee simple, and has resided upon said premises for thirteen years last past.

2. That the Chicago, St. Paul, Minneapolis and Omaha Railway Company is a corporation, operating a system of railways within the State of Nebraska, and their branch line from Wayne to Bloomfield, Nebraska, crosses your petitioner's farm from the Southeast corner to the Northwest corner thereof, as shown by diagram upon "Exhibit A" hereto attached and made a part hereof, which said Exhibit A also gives a pencil drawing of the lay of your petitioner's farm and fields and the lay of the land.

3. That your petitioner's farm is so divided by reason of the said railway crossing same, that it is extremely difficult for your petitioner to transfer stock from and to the part upon opposite side of the railway from his buildings; that [fol. 96] gates are maintained by the said Company, but it is difficult to transfer stock through said gates, and by reason of the lay of the land (there being a draw or valley that said railway crosses) it would be easy to build an underground crossing which would connect petitioner's farm by a runway and stock could cross without any danger.

Wherefore your petitioner prays that a time and place may be fixed for hearing upon this application; that the Chicago, St. Paul, Minneapolis and Omaha Railway Company may be notified thereof; that upon said hearing that said Company be ordered to build, make and maintain an underground crossing under its railway track upon this petitioner's farm herein described, in compliance with Section 4 of Chapter 261 laws of the State of Nebraska and that said Company be required to build wing fences to said underground crossing connecting petitioner's land owned by him on both *said* of said described railway, and for such other and further orders herein as may be just and reasonable in the premises.

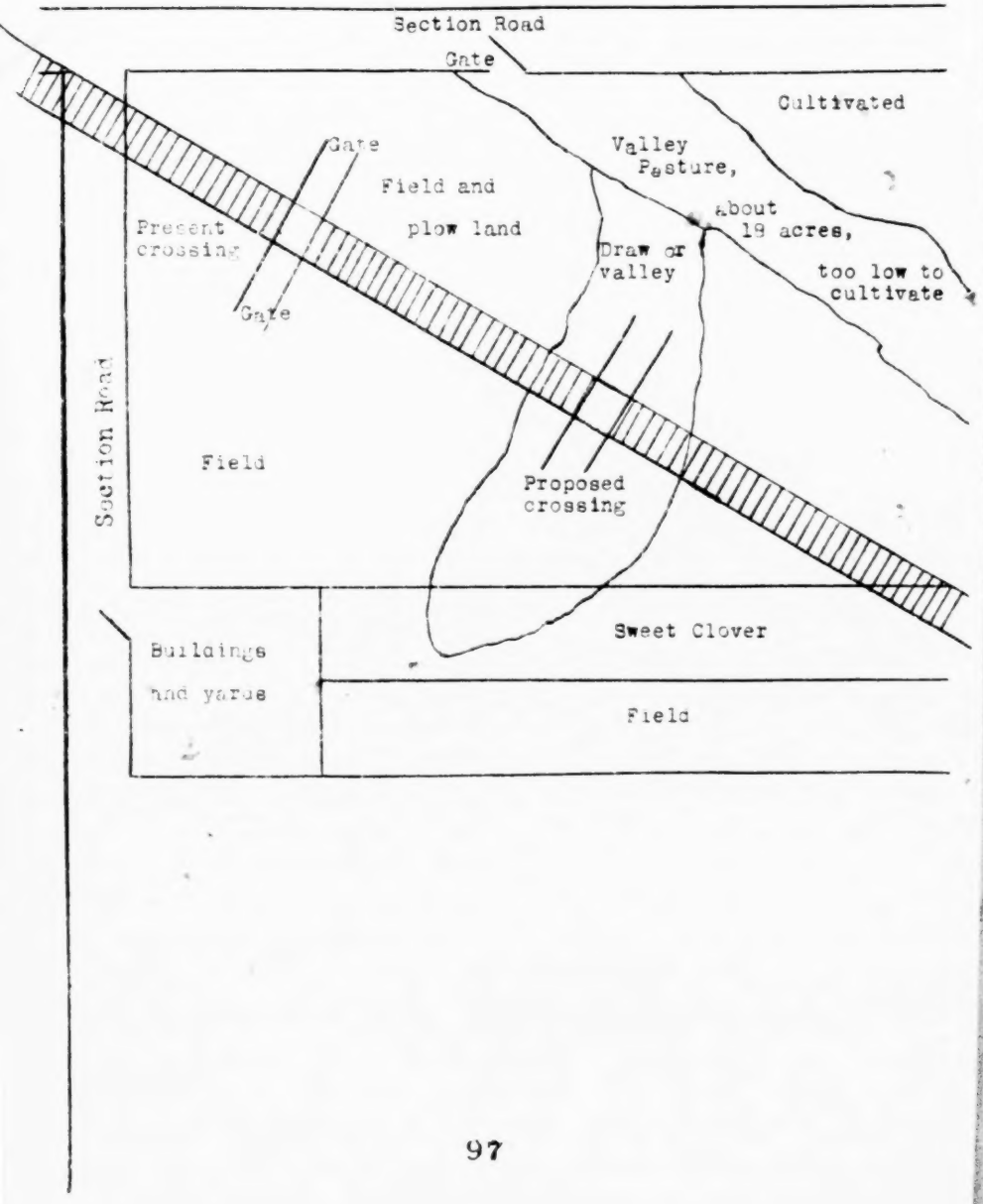
(Signed) August E. Holmberg.

Duly sworn to by August E. Holmberg. Jurat omitted in printing.

(Here follows "Exhibit A" to amended complaint, marked side folio page 97.)

"EXHIBIT A" TO AMENDED COMPLAINT

Northwest quarter, Section Twenty-four, Township 29, N. Range 3, West of 6th P.M., Knox County, Nebraska.



[fol. 98] Received Apr. 17, 1922. Nebr. State Ry. Commission

BEFORE NEBRASKA STATE RAILWAY COMMISSION

F. C. No. 447

ANSWER TO AMENDED COMPLAINT

Comes now Chicago, St. Paul, Minneapolis and Omaha Railway Company and for answer to plaintiff's amended complaint filed herein admits that plaintiff is a farmer in Knox County, Nebraska, but as to whether he owns the lands by the title described in Paragraph 1, this defendant has not sufficient information to form a belief and therefore denies the same.

Defendant admits that it owns a line of railway between Wayne and Bloomfield, Nebraska.

2

Further answering this defendant denies each and every allegation in said amended complaint contained not hereinbefore specifically admitted to be true.

3

Further answering this defendant alleges that plaintiff is already, at the present time, provided with an adequate crossing which is amply sufficient for all his needs, that said crossing consists of a surface crossing equipped with proper gates and kept in suitable condition, and there are no peculiar circumstances or conditions at said place requiring a better or more adequate means of crossing over the tracks of the defendant for the plaintiff's accommodation and use.

[fol. 99]

4

Further answering defendant alleges that to construct an underground crossing for plaintiff's use as prayed by him, would involve an expense of approximately Two Thousand and no/100 Dollars ($2,000.00), and that under the statutes of the State of Nebraska plaintiff would be required to pay one-half the cost thereof at least, in excess of $600.00, but

defendant alleges that to require the defendant to construct an underground crossing, under the circumstances, would be improper in this case because plaintiff is already adequately provided with a means of crossing over the railroad track.

Wherefore, defendant prays that plaintiff's complaint be dismissed, but that in any event plaintiff be required to pay the cost of such underground crossing if the Commission shall determine that one should be constructed.

Chicago, St. Paul, Minneapolis and Omaha Railway Company, by (Signed) Wymer Dressler, R. D. Neely, Paul S. Topping, Its Attorneys.

Duly sworn to by Wymer Dressler. Jurat omitted in printing.

[fol. 100] Before Nebraska State Railway Commission

Formal Complaint No. 447

[Title omitted]

Opinion and Order

Cook, Commissioner:

Plaintiff filed his petition herein, asking for a hearing before the State Railway Commission upon his said petition, praying for an underground crossing under the tracks of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, which tracks cross plaintiff's quarter section farm diagonally from the southeast corner to the northwest corner. Hearing was held at Wausa, Nebraska, on the 28th day of June, 1922, the plaintiff, A. E. Holmberg, being represented by P. H. Peterson, attorney, and the defendant, Chicago, St. Paul, Minneapolis & Omaha Railway Company, by Wymer Dressler, attorney.

The evidence in this case shows that the plaintiff's farm is devoted exclusively to agriculture. He has no livestock save such as is incidental to an agricultural farm consisting of 160 acres. The railroad bisects plaintiff's land. His buildings are located on the westerly side, about opposite

the center of the quarter section. A level grade crossing, suitably placed and with good gates in the fence is pro-
[fol. 101] vided and maintained for his use directly east of his buildings, permitting him to cross the tracks with his farm machinery of all kinds and with his livestock whenever he desired to reach the east portion of his farm. On the east side the land is devoted to the cultivation of corn and small grain, with a narrow strip of meadow about thirty rods east of the tracks. Plaintiff testified that he has never owned more livestock than at the present time and did not expect to own more in the future; that his farm is purely an agricultural farm; that for a grade crossing the private crossing described is in good condition and adequate; and that his farm and his interests are no different than those of other farmers along the side of railroad tracks in that part of the country. Plaintiff does not testify, nor does he claim in his petition, that the grade crossing is inadequate. He does not testify, nor does he claim in his petition, that an underground crossing is reasonably necessary for his use on his farm. His petition charges that it is difficult for him to transfer his stock from one part of his farm to the other part on the opposite side of the railroad and that it would be easy to build an underground crossing which would connect the two parts of plaintiff's farm by a runway so that stock could cross without danger. The evidence does not show that the crossing is inadequate. Plaintiff admits in evidence that for at least three-fourths of the year he would have no use whatever for an underground crossing. It appears also for about the same portion of the year plaintiff would have no occasion to drive his stock from the building-side of the railroad to the opposite side. Evidence shows that plaintiff already has watering facilities for stock on both sides of the tracks, the condition as found having existed on plaintiff's land for more than twenty years.

If he had an underground way as prayed for in his ap-
[fol. 102] plication he would have no immediate use for the same. There is nothing on the east side of the tracks which could be used for pasture for livestock and there will be no such pasture there until the corn is harvested late in the fall. It is quite apparent that an underground cross-

ing, as asked for by plaintiff, would be a convenience three or four months during each year late in the fall and winter, at a time when the stock on the farm is at liberty to range at large. This convenience, in the judgment of the Commission, is not sufficient to create a necessity that would come within the requirements of the statutes governing such matters.

Chapter 261, Laws of Nebraska, 1921, provides in section four:

"Whenever any person owns land on both sides of the right of way of any railroad, such railroad shall provide and keep in repair at least one adequate means for such landowner to cross the right of way. Any interested landowner, with land on both sides of the right of way of any railroad, may file written complaint with the State Railway Commission against any such railroad that the crossing is not adequate, and the commission thereupon shall make such investigation and hold such hearings as may be necessary, and shall issue such orders as it shall deem necessary, proper, and adequate. If circumstances warrant the commission may require overhead, underground, or grade crossings, and require wing fences at underground crossings, but where such special crossings involve an expenditure of more than six hundred dollars, the landowner shall bear one-half the expense in excess of six hundred dollars."

The first sentence in this section though slightly modified has been the law in this state for a great many years. The balance of the section was added by the last session of the legislature. Under the old law, as above stated, an attempt was made in the case of Omaha & R. V. Ry. Co. vs. Severin, 30 Neb. 318, to compel the railway company to build an overhead crossing or at least to place cattle guards at a private grade crossing. In that case the court says:

"Section 106 of Chap. 16, Comp. Stats., construed, and held, that the 'causeway or other adequate means of crossing,' which railroad corporations are required to make [fol. 103] and keep in repair, when any person owns land on both sides of any railroad, and when requested to do so, is an adequate means of crossing such railroad track and right of way by such owner on foot or horseback, with

wagon or carriage, or with domestic animals under his control, but is not required to be adequate to the free passage of unherded cattle or other domestic animals wandering unrestrained from one side of the railroad to the other.

"Section 1 of chapter 72 construed, and held, that the railroad corporations to which the provisions of said section apply are required, under the penalty of the liabilities therein specified, to erect and maintain fences on both sides of their railroad 'suitably and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages'; that this includes the space on either side opposite to private or farm crossings of the railroad, at which points such corporations are required to make or leave openings in such fence with gates or bars to close and secure such openings; but are not required to put in cattle guards at such private or farm crossings."

In Postle v. C. B. & Q. R. R. Co., 98 Neb. 192, it appeared that a surface crossing to accommodate a farmer had been constructed for twenty-seven years, but the farmer desired an overhead crossing, and attempted to compel the railway company by complaint before the Commission to build an overhead crossing. The Commission concluded that an overhead crossing was necessary, and ordered it constructed, at a cost to the railway company of nearly two thousand dollars. The supreme court reversed the order of the Commission, saying:

"Where 27 years have intervened between the date if an agreement made by the owner of land with a railroad company concerning the construction of a private farm crossing, and the railroad company, in compliance with the agreement, has constructed and maintained an adequate grade crossing there is no obligation upon it to build an overhead crossing merely for the convenience of the landowner, unless changed physical conditions require such overhead crossing.

"Where, under such circumstances, it is shown that the railroad company is willing to construct the overhead crossing if the compalinant will pay the cost of construction and

maintenance, there is no sufficient ground of complaint against the railroad company.

"The evidence examined, and held insufficient to sustain the complaint of the landowner against the railroad company."

It will be observed that in the Postle case the physical conditions had not changed from the time the road was [fols. 104 & 105] constructed to the date of the complaint, and it appeared that the surface crossing has been used without injury to anyone for 27 years. Upon this evidence the supreme court held that the order of the Commission was not sustained by the evidence and that it was unreasonable and oppressive and deprived the railway company of its constitutional rights.

After a careful consideration of all the evidence it is the judgment of the Commission that the real need for an underground way for stock on plaintiff's farm is not sufficiently apparent to require an improvement of this nature at this time.

Order

It is therefore ordered by the Nebraska State Railway Commission that the petition of plaintiff herein for an underground crossing under the tracks of the Chicago, St. Paul, Minneapolis & Omaha Railway Company be and it hereby is dismissed.

Made and entered at Lincoln, Nebraska, this 25th day of July, 1922.

Nebraska State Railway Commission. (Signed) H. G. Taylor, Chairman.

Attest: (Signed) John E. Curtiss, Secretary.

HCL-23-28-C.

[fol. 106] Before Nebraska State Railway Commission

Formal Complaint No. 447

[Title omitted]

Statement of Evidence

Be it remembered, that upon the 28th day of June, 1922, commencing at nine o'clock A. M., a hearing was held by the

Nebraska State Railway Commission at Wausa, Nebraska, at the law office of P. H. Peterson, in the matter of the above entitled cause, the appearances at said hearing being as follows:

For the Plaintiff: P. H. Peterson, Attorney;
For the Defendant: Wymer Dressler, Attorney, R. R. Struthers, Assistant Engineer; August Fisher, Assistant Roadmaster;
For the Commission: H. A. Cook, Commissioner.

And the plaintiff and defendant, in order to maintain the issues on their part respectively, produced certain witnesses who were each duly sworn and who testified in said cause, a copy of such testimony being contained at length herein, as follows:

[fol. 107] Mr. Peterson: The plat there next to the petition gives you an idea of how the farm is situated. The railroad cuts the farm almost from the stoutheast to the northwest corner of the quarter. The buildings are on the southwest part of the farm and there is a draw where there really ought to have been an opening to let the water through, but it is of sufficient size so that the water has not been dammed to any great extent to do any damage. Now, it is very inconvenient for this man to drive his cattle from the place where the buildings are shown across the railroad track, opening the gates, to the opposite side of the farm. The pasture part is on this side here, and then part of the fields where they feed out the stock in the winter time—it is a great hardship and inconvenience to him to transfer the cattle across the track. Now, there is a draw there where it would be a very inconvenient place to make an underground crossing. It could be made, according to my notion of it, at very small expense. The track is of sufficient height there, about ten feet, so that the cattle runway can be made very easily underneath there, and that is the substance of what our proof will be, and we ask that a crossing be established.

AUGUST HOLMBERG, having been first duly sworn by Commissioner Cook as a witness on behalf of the complainant, testified as follows:

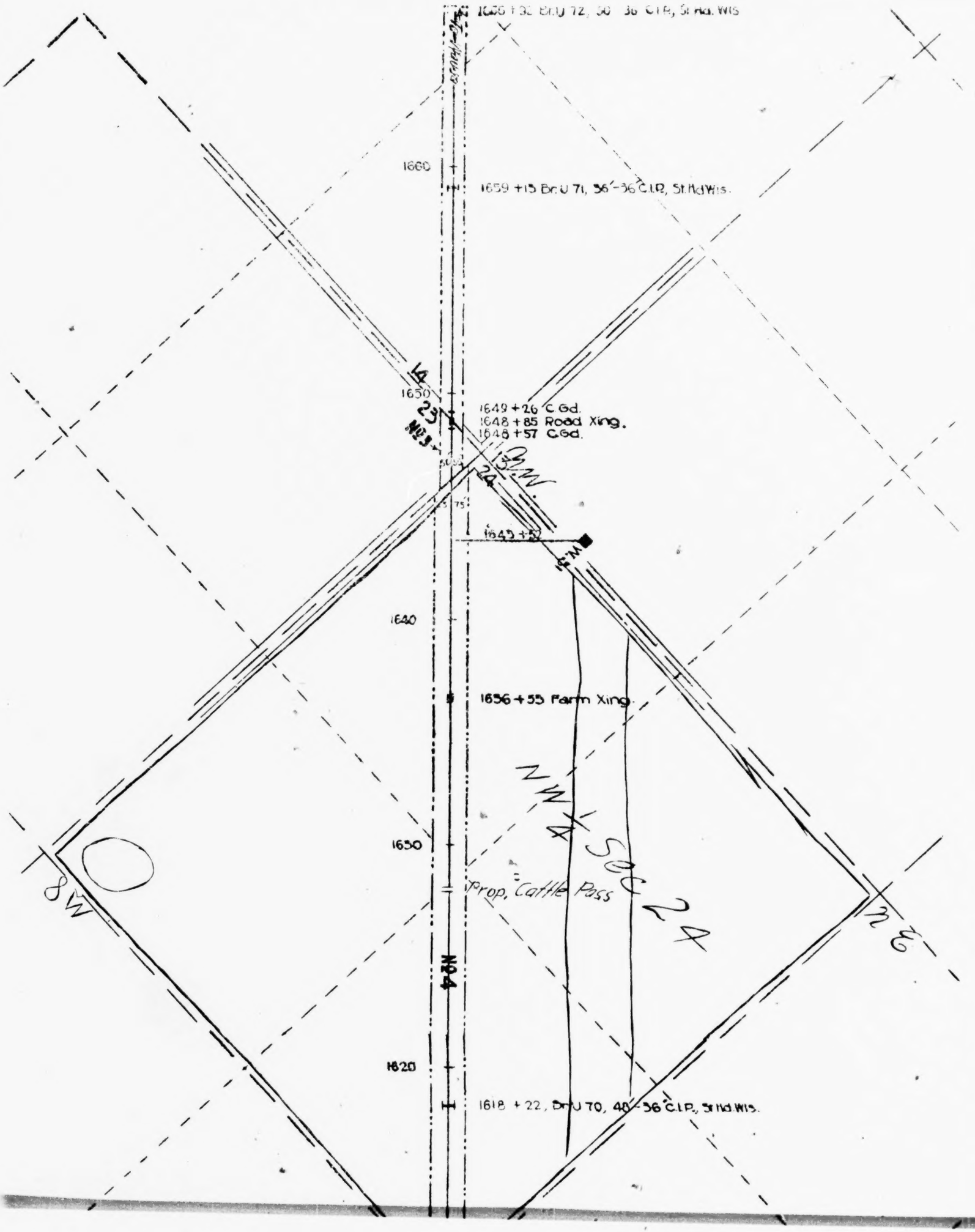
[fol. 108] Direct examination.

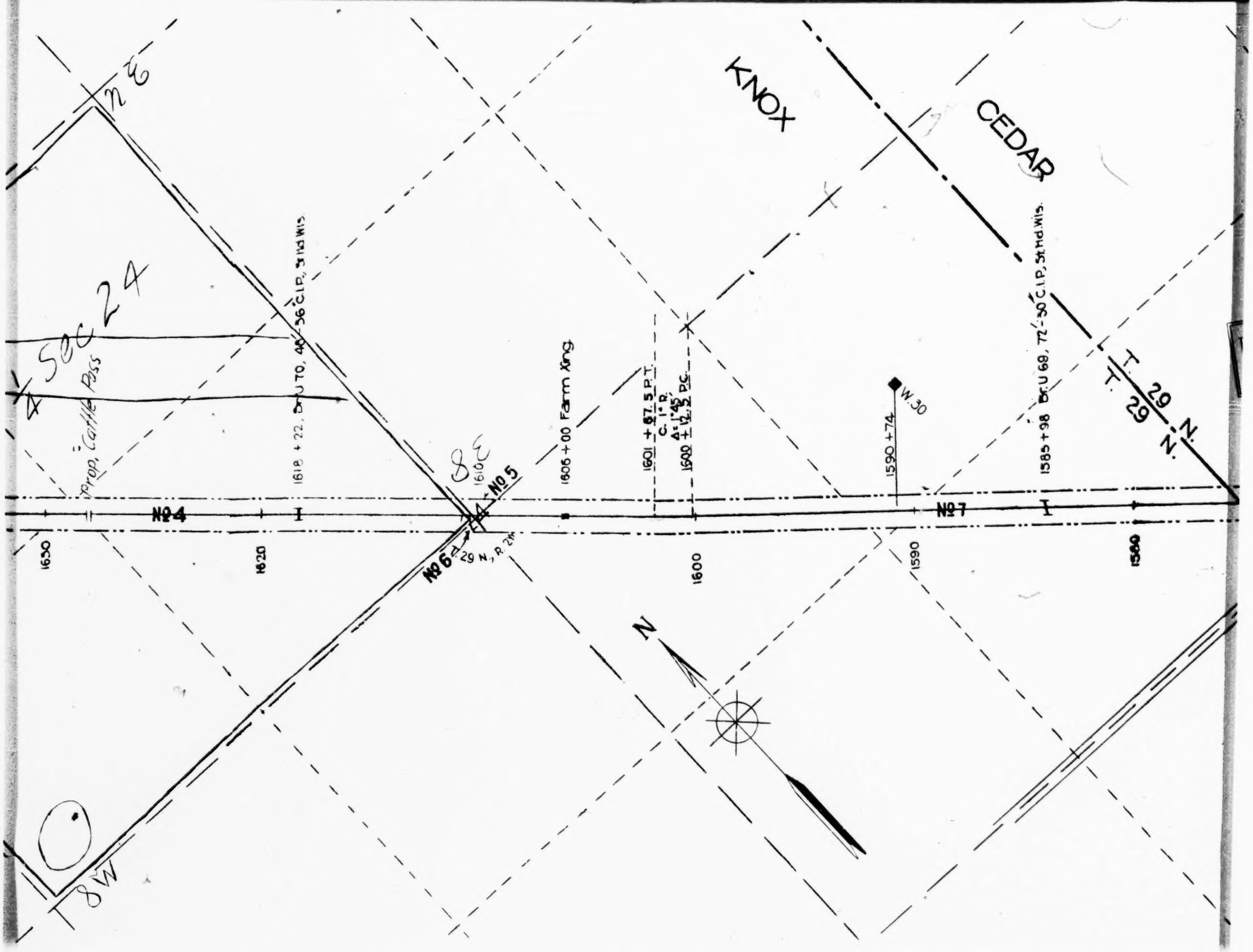
By Mr. Peterson:

Q. What is your name?
A. August E. Holmberg.

(Here follows Exhibit No. 1, marked side folio page 109.)

[fol. 110] Q. And where do you live now with reference to Wausa?
A. I live on this quarter.
Q. About how far is it from Wausa?
A. It is three miles and a half?
Q. And how long have you lived there?
A. I have lived there since in the spring of 1909, I think. It is thirteen years.
Q. Do you own that place?
A. I do.
Q. And how long have you owned it?
A. I am not sure, close to twenty years.
Q. So you had the title to it before you moved on there?
A. Oh, yes.
Q. How is this farm—composed of how many acres, and is it a square quarter?
A. It is a square quarter and it is supposed to be 147.78 acres. I called it 148 acres. The rest is taken out by the Railroad Company.
Q. That is, the C. St. P. M. & O. Railway Company?
A. That is what it is.
Q. How does that cross your land?
A. It crosses it diagonally, almost from one corner to another. There is a trifle more on the half that I don't live on than there is on the one I live on. It just misses the corner about five or six rods. The other corner is right in the center between the railroad.
Q. And state what kind of soil is the land composed of.
A. Well, it is practically all cultivated. There is just the draw that has never been cultivated that should be used


1660
1659 +15 Br.U 71, 36'-36" C.I.P., St.Hd.Wis.
1650
1649 +26 C.Gd.
1648 +85 Road Xing.
1648 +57 C.Gd.
1645 +52
1640
1636 +55 Farm Xing.
1630
Prop. Cattle Pass
1620
1618 +22, Br.U 70, 48'-36" C.I.P., St.Hd.Wis.
NW 1/4 Sec 24
NE
SW
NO 4



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Prop. Cattle Pass
1618 + 22, Br. U 70, 48'-36' C.I.P., St. Hd. Wls.
1606 + 00 Farm Xing
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C. 1° R.
Δ = 1°45'
1600 + 12.5 P.C.
1590 + 74
W. 30
1585 + 98 Br. U 69, 72'-30' C.I.P., St. Hd. Wls.
No 4
No 5
No 6
No 7
1610
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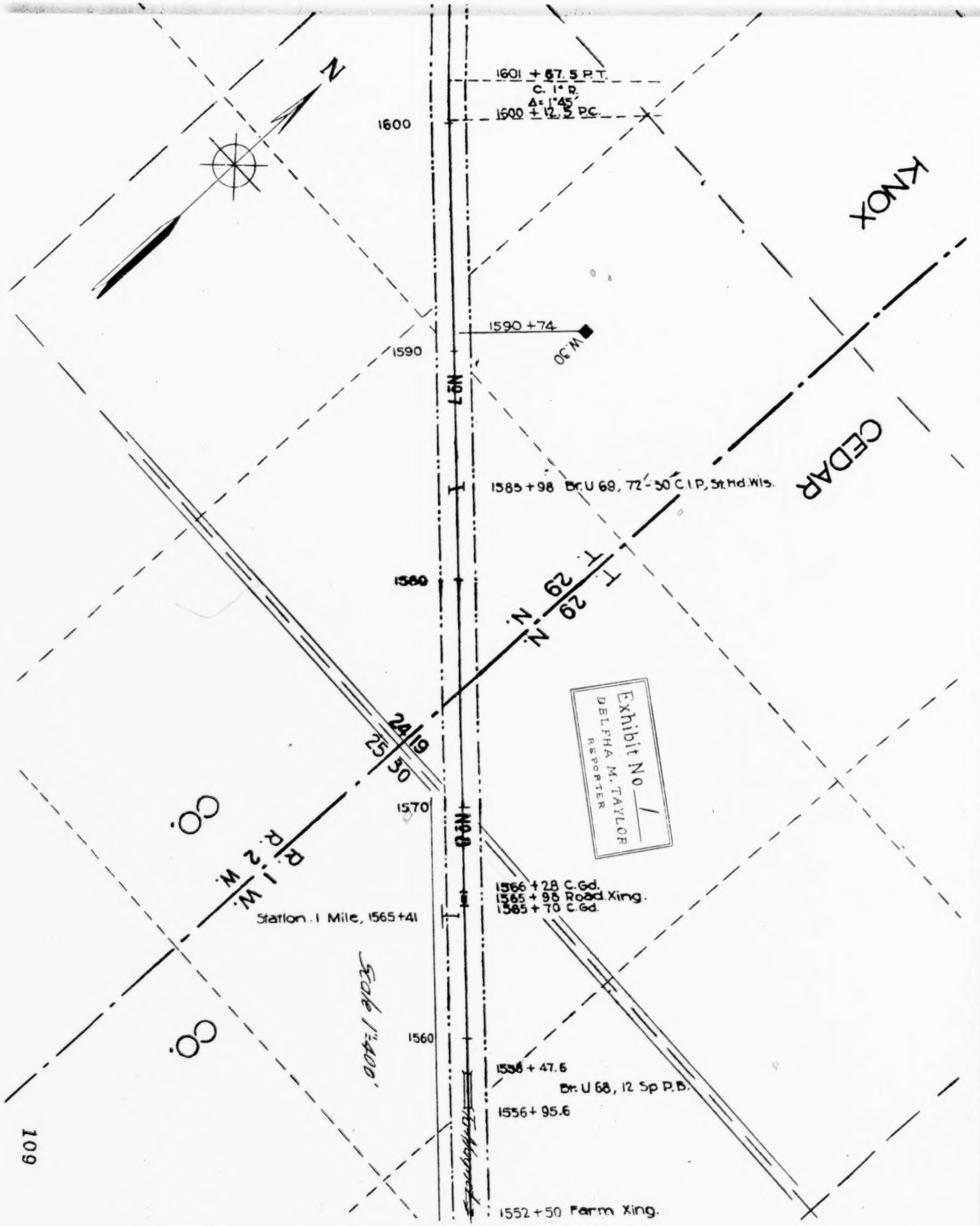

N
1601 + 67.5 P.T.
C. 1° R.
Δ = 1°45'
1600 + 12.5 P.C.
1600
KNOX
1590 + 74
W 30
1590
N 71
CEDAR
1585 + 98 Br. U 68, 72'-30° C.I.P., St. Hd. Wis.
1580
T. 29 N.
Exhibit No 1
DELPHA M. TAYLOR
REPORTER
24 19
25 30
1570
N 60
R. 1 W.
R. 2 W.
CO.
CO.
1566 + 28 C.Gd.
1565 + 90 Road Xing.
1565 + 70 C.Gd.
Station 1 Mile, 1565+41
Scale 1"=400'
1560
1558 + 47.6
Br. U 68, 12 Sp P.B.
1556 + 95.6
1552 + 50 Farm Xing.

109

for pasture. Some seasons it is too wet,—some seasons you [fol. 111] could cultivate it, but you could not very well farm it.

Q. On what part of this quarter are your buildings located?

A. My buildings are located on the southwest corner.

Q. Can you give the description of this quarter,—the section, township and range?

Mr. Dressler: It is stipulated that it is the northwest quarter of 24, township 29.

Mr. Holmberg: The draw there—there is about twenty acres there that we hardly ever touch. That is all the pasture we have, except another that I have to sow in some once in a while.

Q. Where is that located with reference to the buildings?

A. That is on the north side of the track. The buildings are on the south and this is on the north side, so consequently if you want to go there you have to go about three-quarters of a mile to get there around.

Q. And what means of crossing does the railway company furnish you to cross from one side of your farm where the buildings are to the opposite side?

A. Just what they call a private crossing.

Q. It is over the track?

A. It is over the track,—just an opening in the fence. The gates are really in such shape most of the time that if you send children they can't drag them.

Q. Is there any underground crossing on this railroad across your farm?

A. No, there isn't. There is a storm culvert laying away down deep in the ground but that is on the opposite side of the farm again.

Q. Well, is that high enough so that you can run cattle through there?

[fol. 112] A. No, sir.

Q. So the only way you have to get to your farm on the opposite side from where your buildings are is to cross where the gates are?

A. That is the only way.

Q. And how far are these gates from your buildings approximately?

A. Well, they are diagonally across the quarter.

Q. Well, give in rods about how far it is.

A. About 60 rods,—no, it is more than that; it is eighty rods anyway.

Q. Just say about how far you think it is.

A. About eighty rods.

Q. Have you got a place picked out where you think it would be convenient to establish an underground crossing?

A. Yes, I think it would be mighty handy to put one in.

Q. Just describe the condition of the railroad grade at the place where you think a crossing could be put in.

A. Well, there is a little draw in there,—it is a draw that don't gather a great deal of water, I know that, and the grade is plenty high on one side,—it must be about twelve feet anyway. On the upper side it is a trifle lower, but that should not make any difference because there is plenty of room in there for cattle to get through.

Q. And if you had a cattle runway under the track it would be of more convenience to you, would it, in handling your cattle and stock?

A. Sure it would.

Q. What is the condition now when you have to handle your cattle, during the winter months especially?

A. You have to go up there and open the gate to drive them through and you have to go up and open the gate to [fol. 113] drive them back. If you had an open place there they would go of their own accord and you wouldn't have to drive them.

Q. What use do you make of your forage, corn stalks and such things as that?

A. Just feed it; let the cattle go there and pick it up.

Q. And your *hards* are where it is shown on the plat?

A. Yes, sir, they are all there.

Q. And the only way you can feed the cattle is to drive them across on the crossing?

A. That is the only way.

By Commissioner Cook:

Q. Have you a water supply in the pasture on the opposite side of the railroad track?

A. I have one there but you have to pump it by hand.

By Mr. Peterson:

Q. Well, you have no creek or natural flow of water on the quarter?

A. No.

Q. But you have a windmill and well up where the buildings are?

A. Yes, sir.

Q. And then you have a well up there?

A. Yes, sir, we pump by hand.

Q. And if you had a runway you could build a road or a chute for them to go up to the house where you have a windmill for water?

A. Sure I could.

Q. What would be necessary for the railroad company to do in order to make or establish an underground crossing there?

Objected to on the ground that no foundation has been laid.

Objection overruled. Exception.

A. I don't see as it would be necessary to do anything [fol. 114] but drive two sets of piling with short stringers over.

Q. In your judgment how wide would it be necessary for this runway to be made?

A. It would not need to be more than eight feet.

Q. That would be a sufficient width to accommodate your use of it?

A. Yes, it would. All I ask for is just for enough room for the cattle to go through there.

Q. How high or deep would it need to be?

A. Seven feet is plenty. It don't need to be any deeper than the height of the barn door, and that is seven feet. The cattle would go through there if you take three feet off it. The cattle would get used to it.

Q. You think it would need to be how deep?

A. If it is six feet in the clear everything would go through there, although it ought to be seven feet.

Q. As to the expense in putting this in, can you testify to that? Do you know?

A. No, I can't, but I shouldn't think it would cost a whole fortune.

Q. What would your idea be of the expense?

Objected to on the ground that no proper foundation has been laid.

Objection sustained. Exception.

Cross-examination.

By Mr. Dressler:

Q. Mr. Holmberg, this blue print here represents correctly the shape of your farm with the railroad running through the center of it, does it?

A. Yes. This corner is right in the center, and that misses it a few rods.

(Here follows Exhibit No. 2, marked side folio page 115.)

[fol. 116] Q. The center of your farm is about here where you want the crossing?

A. Yes, sir.

Q. And this is your present farm crossing here, indicated in the northeast quarter of this quarter?

A. Yes, sir.

Q. And your buildings are down here in the southwest quarter, right about where the circle is?

A. Yes, sir. Now, this crossing that I am speaking of would be located just about here. (Witness points to blue print.)

Q. Located where these yellow lines are indicated?

A. Well, it is somewhere in there,—right about in the center.

Q. How many cattle do you own at the present time on that farm?

A. Oh, at the present time there are about thirty-five head of cattle there right now.

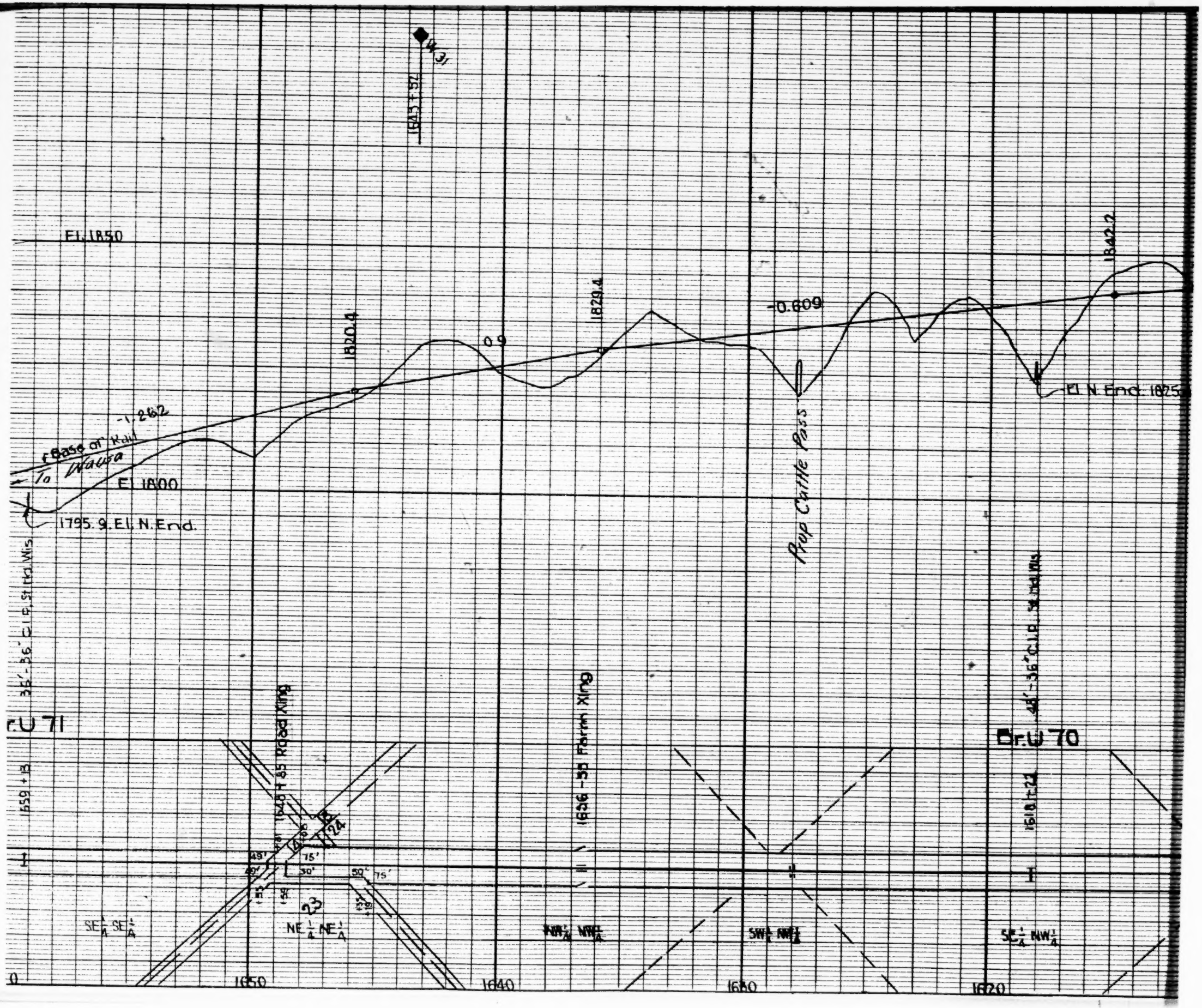
Q. And how many horses?

A. Four.

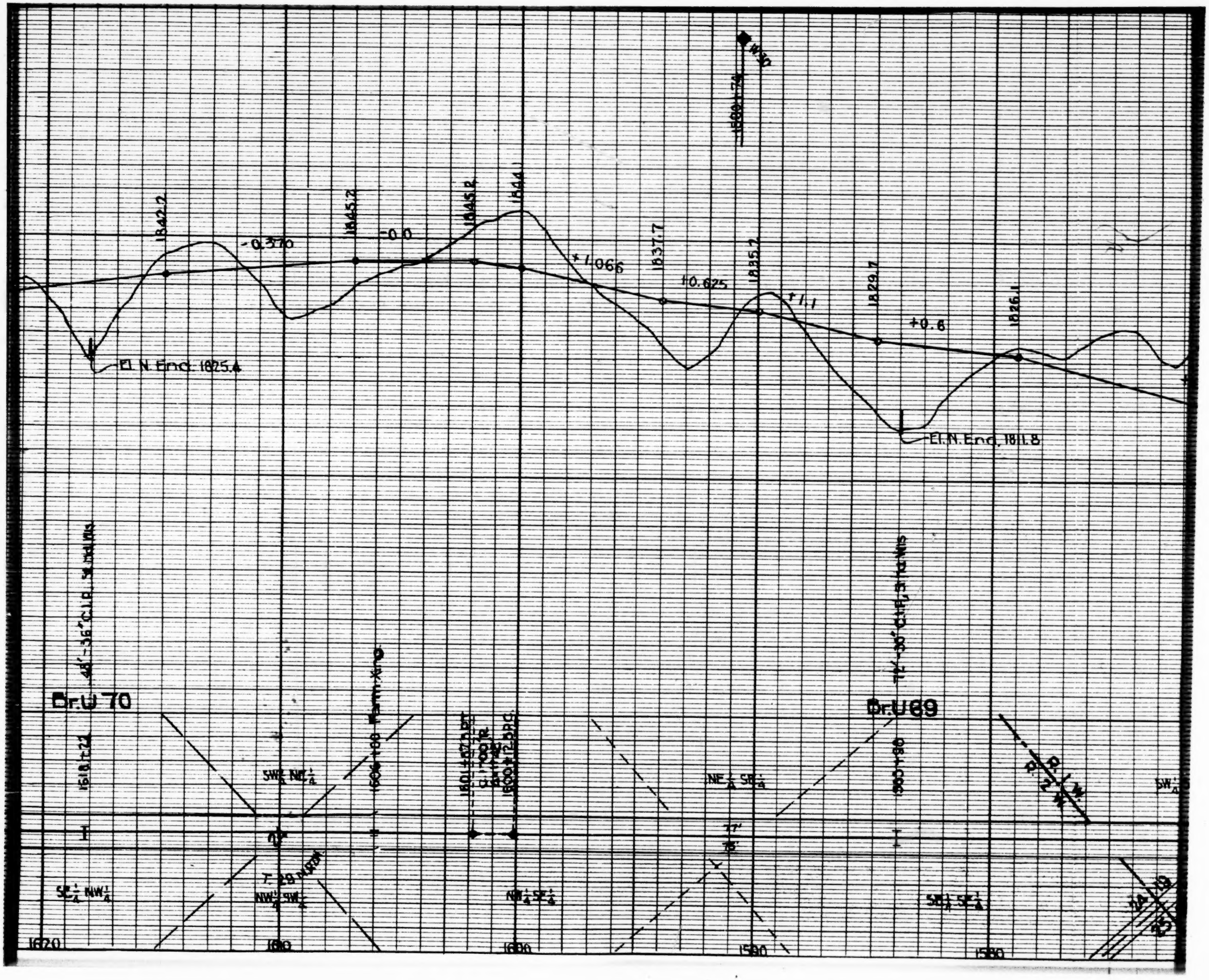
Q. And how many cattle did you have last year, approximately,—not absolutely?

A. Something like twenty-five or thirty.

Q. And what is the most number of cattle you have ever had on that farm?



El. 1850
El. 1800
1795.9 El. N. End.
Base of Rail
To Wausa
-1.262
1820.4
0.9
1829.4
-0.609
1842.2
El. N. End. 1825
Prop Cattle Pass
Br. U 71
Br. U 70
1648+85 Road Xing
1636-35 Farm Xing
1659+13
1618+22
36'-36" C.I.P. St. Hd. Wis.
48'-36" C.I.P. St. Hd. Wis.
SE¼ SE¼
NE¼ NE¼
NW¼ NW¼
SW¼ NW¼
SE¼ NW¼
1650
1640
1630
1620



1842.2
-0.370
1845.2
-0.0
1845.2
1844.1
+1.066
1837.7
+0.625
1835.2
+1.1
1829.7
+0.6
1826.1
El. N. End. 1825.4
El. N. End. 1811.8
Br. U 70
Br. U 69
SW¼ NE¼
NE¼ SE¼
SE¼ NW¼
NW¼ SW¼
NW¼ SE¼
SE¼ SE¼
1620
1610
1600
1590
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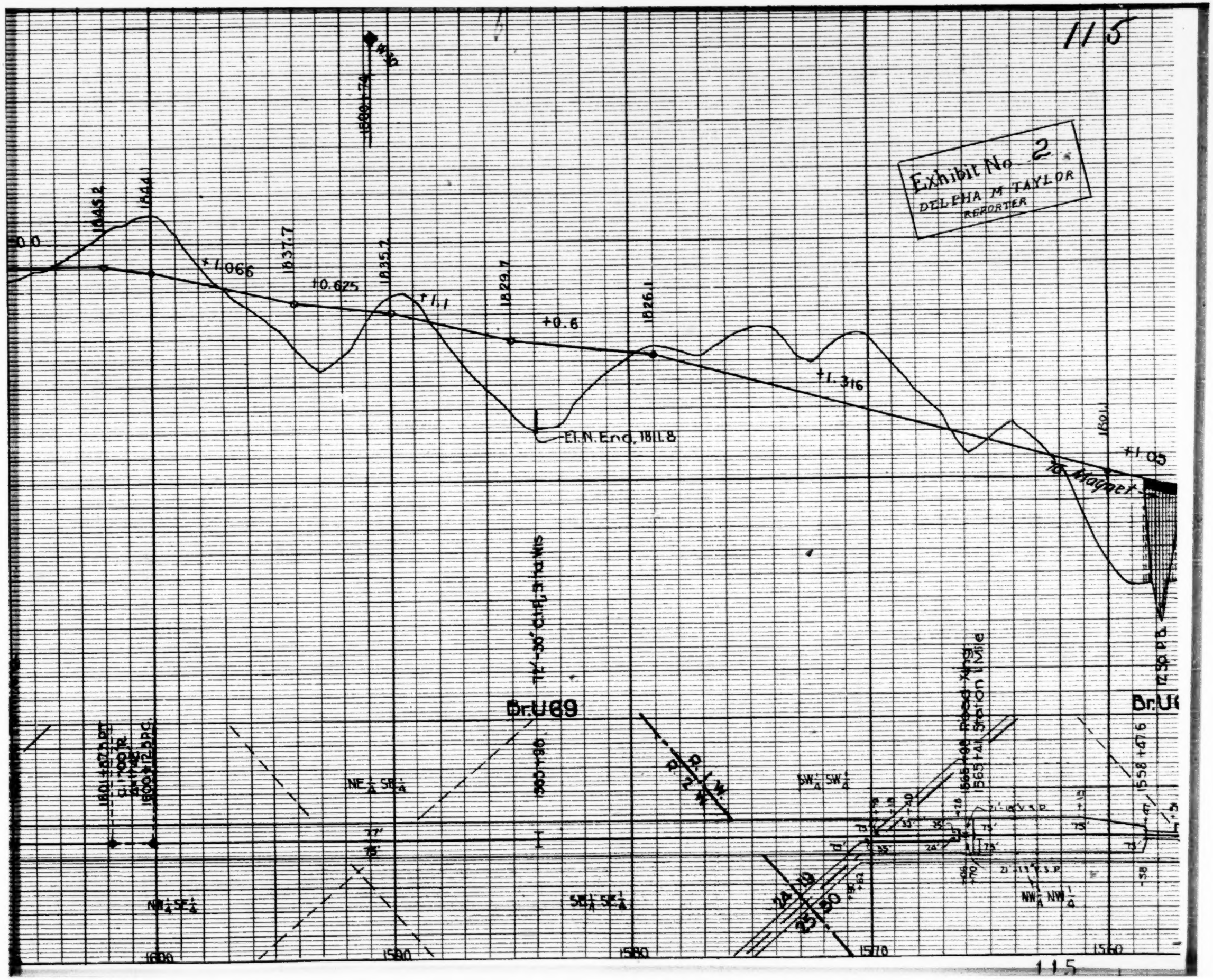
Exhibit No. 2
DELPHA M TAYLOR
REPORTER
1845.2
1844.1
+1.066
1837.7
+0.625
1835.2
+1.1
1829.7
+0.6
1826.1
+1.316
El. N. End, 1811.8
1801.1
+1.05
To Magnet
Br. U69
Br. U
NE 1/4 SE 1/4
NW 1/4 SE 1/4
SE 1/4 SE 1/4
SW 1/4 SW 1/4
NW 1/4 NW 1/4
1600
1590
1580
1570
1560

A. I don't know; thirty to thirty-five,—about thirty-five head.

Q. Do you expect to have more cattle in the future than you have at the present time?

A. Oh, not particularly, no.

Q. Do you expect to have more horses than you have at the present time?

A. Why, that depends on if the tractor plays out; otherwise I generally keep six.

[fol. 117] Q. You use a tractor for your farm work generally, do you?

A. Yes, sir, for plowing, and then I do not need the two extra horses.

Q. As I understand it, you have a pasture on each side of the railroad track?

A. Yes, sir.

Q. The pasture runs clear across the farm parallel with the railroad track?

A. Almost.

Q. And how far distant from the track?

A. Well, I think it is about thirty rods.

Q. The pasture is about thirty rods wide?

A. No, the field.

Q. And then to the east of that is the pasture?

A. Yes, sir.

Q. And does the pasture take up the balance of the farm then to the east?

A. No, there is still forty acres in here.

Q. So the pasture consists of a narrow strip paralleling the railroad track about thirty rods away?

A. Yes, sir, there is in the neighborhood of twenty acres in that strip.

Q. And do you have any pasture on the west side of the track?

A. Only temporary. There is temporary sweet clover pasture there right now.

Q. Is it your idea that if you had an underground crossing you would have a runway for your cattle clear across the pasture?

A. I could, yes. Sometimes you would have to change the ground and put it out for a year or two and then put it back again.

[fol. 118] Q. What portion of the year do you have cattle and horses running in the field east of the track?

A. The pasture is supposed to be all the year round. When the fall comes and it is cut then they go all over here.

Q. So you use the east side of your farm all winter for what stock you have and all summer too?

A. Yes, sir.

Q. Now, assuming that an underground crossing is put in, would a concrete pipe seventy-two inches high—that would be six feet—seventy-two inches in diameter—answer the purpose? Would that size be sufficient to answer your purpose?

A. I don't know. I never saw one of them round ones.

Q. Well, it is just simply a concrete culvert six feet in the clear with a flat bottom so an animal could walk on the bottom of it.

A. I should think it would,—I don't know.

Q. Would horses go through that sort of a place?

A. I reckon they would.

Q. That would be thirty-six feet long, that kind of a culvert?

A. That is going to be a pretty expensive affair, isn't it?

Q. Yes, I was going to ask you,—nothing smaller than six feet in the clear would do, would it?

A. No, I wouldn't want to put in anything smaller than that.

Q. Assuming that that kind of a culvert cost $1,762, are you willing to put up the cash for about $581 to help pay for it?

A. Well, that is quite a bit for a runway. That is twice as much as a pile bridge costs.

Q. Mr. Holmberg, if you cut an opening in the grade there what effect is that going to have on flood waters?

[fol. 119] A. None at all.

Q. Which side of your land is the higher there?

A. Why, the south side is the highest.

Q. That would drain the land away from your buildings then?

A. Yes. You see, where this crossing comes in that I was speaking of, it lies in a draw but there is a ridge like a horseshoe running around, but that is so close to the

track that I never saw over a foot of water there in the spring.

Q. There would be no element of flood there?

A. No, none whatever. All the ground is that way. It doesn't gather water there in floods, even where the culvert is.

Q. You have had that surface crossing there ever since you owned the farm?

A. Yes, sir.

Q. Do you actually have to transfer your stock over that private crossing?

A. I do in the winter time; not at present, because I have corn there right now.

Q. You have a well and tank over on the north side?

A. Yes, sir,—when I keep cattle in there.

Q. How many years have you had that equipment there?

A. Oh, about eight years, I guess.

By Commissioner Cook:

Q. If you had this crossing as contemplated underneath, would you maintain your water supply and tank on the north side of your farm?

A. Why, it is there now and I would leave it alone. I don't know as I would have to use it. I don't think I would,—not unless a man temporarily has to use his ground [fol. 120] in a different way. You know, sometimes you have to seed your ground in and leave it lay. You can't leave it there all the time simply because your cattle goes over it. You have to break it up sometimes and change it around, but on the north side of the railroad track it is just as much a part of my farm as the other side, and to go over there you have to either go over it or go around it, but I never figured on that I *I* would have to pay that much to get a crossing in there. I thought the highest would be a couple of hundred dollars perhaps.

Redirect examination.

By Mr. Peterson:

Q. You are willing to pay whatever the law and the Commission might require you to pay in order to get this crossing?

A. I would unless it busted me up.

Q. Your theory was that the reason they would not put in any culvert but used the wooden piling that they could make you an underground crossing the same as the bridges and the other underground crossings are constructed?

A. Yes, sir, they just put up a pile bridge here last fall. This bridge a quarter of a mile down here from town, that was put in brand new a year ago last summer.

[fol. 121] R. R. STRUTHERS, having been first duly sworn as a witness on behalf of the defendant company, testified as follows:

Direct examination.

By Mr. Dressler:

Q. Mr. Struthers, you live where?

A. St. Paul.

Q. What are your initials?

A. R. R.

Q. And your business?

A. Civil engineer.

Q. For the M. & O. Railroad?

A. Yes, sir.

Q. And have you made calculations in your office as to the cost of installing a 74-inch reinforced concrete culvert for the purpose of an underground crossing at this location?

A. Yes, sir.

Q. And I will show you this sheet and ask you if that is a detailed statement of the cost. (Handing witness paper.)

A. It is.

Q. And the total cost amounts to what?

A. $1,762.

Q. Now, I will show you another sheet, which is figured on an 84-inch basis, and ask you if that is a detailed statement of the cost for an 84-inch culvert.

A. It is.

Q. And what is the total cost?

A. $2,094.

Q. I notice there is a correction there in the item of freight [fol. 122] charges. Why was that made?

A. The freight charges first were just put in at a percentage rate, whereas they have been corrected to take into account a tariff rate.

Q. And where does that contemplate bringing in the material from?

A. From St. Paul.

Q. Do you have material any closer than that?

A. That is the closest there is. The Massine plant is located half way between St. Paul and Minneapolis.

Q. Is that where you get the material you use in constructing all of your bridges?

A. Yes, sir.

Q. Would it be possible that you know of to get the same material closer?

A. Not that I know of.

Q. Have you made any calculations on a pile bridge?

A. Yes. I have made calculations on a pile bridge. A one-span pile bridge costs $635.

Q. How wide would that be?

A. Thirteen feet from center to center of the outside piling.

Q. And how high?

A. Well, that should have seven foot in the clear.

Q. Does that expense include all of the necessary excavations to get the dump cut down so as to make an approach to the bridge and everything like that?

A. It does.

Q. It includes everything?

A. Yes, sir.

Q. What is the history of pile bridges as to fire hazards?

A. Well, they have been proven fire hazards very often, and in——

[fol. 123] EXHIBIT No. 3

Base of Rail to Flowline of Pipe 9′ 6″

Proposed 68″ x 74″ R. C. P. 36 Ft. Long

	Labor.	Material.	Total.
Engineering	25	...	...
Falsework (1 span P. B.—usable material)	130	140	...

	Labor.	Material.	Total
Excavation, 130 yards	98	...	...
36 lin. ft. 68″ R. C. P.	144	414	...
20 cu. yds. rip rap	45	20	...
Wing Fences	10	5	...
Backfilling	50	...	...
Removing falsework	50	...	...
Train Service	200	100	...
		199	
Freight Charges, interest, etc.	...	[87]*	...
Trans. of men, interest, etc.	75	...	...
Store Expense	...	57	...
Totals	827	823	1650
		112	112
		935	1762

Exhibit No. 3. Delpha M. Taylor, Reporter.

[fol. 124] EXHIBIT No. 4

Base of Rail to Flow Line of Pipe 10′ 9″

Proposed 84″ x 89″ R. C. P. 36 Ft. Long

	Labor.	Material.	Total.
Engineering	25	...	...
Falsework (1 span P. B.—usable material)	130	140	...
Excavation—150 yds.	113	...	...
36 lin. ft. 84″ R. C. P.	144	585	...
30 cu. yds. rip rap	75	30	...
Wing Fences	10	5	...
Backfilling	55	...	...
Removing falsework	50	...	...
Train Service	200	100	...

[*Figures enclosed in brackets erased in copy.]

	Labor.	Material.	Total.
Freight charges, interest, etc.	...	[115]*	...
		284	
Trans. of men, interest, etc.	80	...	...
Store Expense	...	68	...
Totals	882	1043	1925
		169	169
		1212	2094

Exhibit No. 4. Delpha M. Taylor, Reporter.

[fol. 125] —the long pile bridges where it would be liable to tie up the line for quite a space of time we keep a watchman just for fire hazards.

Q. And what is the policy of the company as to putting in pile bridges at the present time?

A. We are getting away from it just as fast as we can.

Q. How recently have these concrete culverts been manufactured so that they were fit for railroad use?

A. We have been putting concrete culverts in for eight years.

Q. Have they been proved to be the satisfactory kind of culverts?

A. They have.

Q. What about the question of safety? Is a concrete culvert which is covered over with dirt so that the roadbed is solid on top of it, is that safer than a pile bridge proposition?

A. Yes, sir.

Q. What would the pile bridge include on this branch if you built a pile bridge there?

A. It would include two bands, five piles to a band. On top of the two bands are piling. There is a cap of 14 x 14 x 14, that is, 14 inches by 14 inches by a 14 foot cap, and under each rail there would be three stringers 8 x14 as to

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[*Figures enclosed in brackets erased in copy.]

span distance. On top of that would be the track ties,—the track ties will be kept in line, and your guard rail on top of those.

By Commissioner Cook:

Q. Now, that would provide what size opening under the bridge?

A. You would have an opening on the ground—I might say that the ground slopes to the north, that is, the embankment is only about eight foot high on the south side [fol. 126] and about twelve foot on the north side, but directly underneath the track you would have an opening I would say of seven foot beneath the stringers at the center of the track. We have to excavate the ground lower out at the south side of the bridge to provide a seven-foot than the natural ground surrounding it.

Q. What width would it be?

A. You would have about eleven and a half feet in the clear.

By Mr. Dressler:

Q. Are there any operating reasons why a bridge of some kind should not be placed there that you know of?

A. Yes, there is a continual maintenance expense. It would have to be renewed. It depends of course upon the class of timber you get. It varies from eight to eleven years.

Q. And of course the maintenance expense in case of fire would be equivalent to a new bridge?

A. Yes, sir.

Q. And what is the fact as to floods? Suppose a cloudburst should occur; what is the relative resistance power of a pile bridge as compared to a concrete culvert?

A. Well, you can lose a deck on your pile bridge, whereas if you tied up your line the other way you would have to have your embankment washed out.

Q. The culvert is much more secure from a washout standpoint than a bridge?

A. It is.

Q. Well, is there any maintenance expense at all to a concrete culvert?

A. There is not.

[fol. 127] Q. What is the fact as to the expense of maintaining a pile bridge from year to year in the way of inspection cost and renewing pilings as they may depreciate?

A. Every year there has got to be two inspections made—one in the spring and one in the fall—of all pile bridges, and all timber that appears to be getting a little soft or decayed is taken out and renewed, and there are very few bridges that after they are four or five years old don't have some work that has to be done on them every year.

Q. Would you say from a practical railroad engineering standpoint that it would be good policy to put in a pile bridge at this day and age when you can get reinforced concrete bridges that would be permanent?

A. I would not. Our policy is to get way from it just as fast as we can.

Q. It is cheaper in the first installation but experience shows it to be more expensive in the long run, is that it?

A. That is it.

By Commissioner Cook:

Q. Is this price you put on the wooden bridge an estimate or actual cost?

A. It is an estimated cost.

By Mr. Dressler:

Q. Is the price you have fixed on the stone bridge an estimated cost?

A. It is.

Q. Of course, nobody can tell what it actually costs until you do the work?

A. Nobody can.

[fol. 128] Cross-examination.

By Mr. Peterson:

Q. How long have you been an engineer for the C. St. P. M. & O. Railroad Company?

A. About eight years.

Q. And during that time you have pursued the same policy as you say they are advocating now?

A. Yes, sir.

Q. Well, now, you say it is their policy to get away from the pile bridge and put in concrete bridges wherever they make a new bridge?

A. That is the general policy.

Q. Does that apply to these little branch roads like the one running from Wayne up here to Blooffield, or is it the main road that you refer to.

A. To all of our lines.

Q. And you have followed that policy all along since you have been engineer?

A. In a general way.

Q. Well, how did you come to have a wooden bridge put in here about a mile from Wausa last year? Why didn't you put in a concrete bridge there?

A. Well, there are some times that we cannot raise enough money in one year to renew every bridge with concrete.

Q. And when it comes to a question of expense like that, why you find that it is more economical and better to build a wooden bridge, don't you, and you do that?

A. We do.

Q. And in this case the reason you advocate the concrete here is in order to show that the expense is so much greater than the wooden bridge?

[fol. 129] A. No, sir.

Q. How long would be the life of this pile bridge that you refer to in your testimony?

A. From eight to eleven years.

Q. Have you rebuilt all of the bridges on this branch from Wayne up to Bloomfield since it was built some thirty years ago?

A. Yes, I would say all the pile bridges have been renewed. They may have been renewed a piece at a time but they have been renewed.

Q. More than once?

A. Yes, I would say some of them more than once.

Q. And have you any actual knowledge or is it just your estimate?

A. Well, I will say this much, that whenever our records show that a bridge is ten or eleven years old we generally recommend to the management that it be rebuilt.

Q. And that is on the main line, isn't it?

A. No, sir.

Q. You give just as much attention to these branch lines as you do the main road?

A. Absolutely. I might say for your information that this year we are putting in 4,200 lineal feet of concrete pipe to replace pile bridges.

By Mr. Dressler:

Q. That is in the year 1922?

A. That is in the year 1922,—and those sizes vary from twenty-four inches to eighty-four inches in diameter.

By Mr. Peterson:

Q. And can you name any branch line of the size running from Wayne to Bloomfield where you are putting in one of those?

[fol. 130] A. Well, offhand I cannot.

Mr. Dressler: I can; one west of Coburn and another one west of Tekamah.

Q. Now, regarding the fire hazard of the wooden bridge, what has been your experience how many bridges have ever burned on the Nebraska division, for instance?

A. I am not acquainted with that feature.

Q. And what is your experience regarding the fire hazard on the whole road? What percent of the bridges burn every year?

A. Well, I can't answer that directly either.

Q. Now, Mr. Struthers, to be fair on this proposition, if you constructed a wooden bridge and you covered the ties with concrete there would be very little fire hazard, wouldn't there?

A. We don't cover our ties with concrete on a wooden bridge.

Q. I am asking you if you did do it what would be the fire hazard?

A. Why, if we did it there wouldn't be any fire hazard from the top.

Q. The only fire hazard you would have is if somebody would go underneath it and start a fire, wouldn't it?

A. Yes.

Q. And isn't it almost just as safe from the point of fire hazard when you cover it with crushed stone as concrete?

A. No, it is not.

Q. So the best way to safeguard any fire hazard would be if you covered it with concrete, wouldn't it?

A. That would be the best.

[fol. 131] Q. How long did you estimate that this concrete culvert would have to be to go through that dump?

A. Thirty-six feet.

Q. Have you been out there and measured the dump?

A. I have.

Q. And how wide did you measure the dump to be?

A. About thirty-four feet.

Q. At the bottom?

A. Yes.

Q. Do you think that it would need a thirty-six feet culvert or isn't it a fact that a 24-foot one would do?

A. No, I wouldn't say—it would take the thirty-six. Those pipes come in six-foot lengths and you can't break them off anywhere you want to. You have to take your thirty-six foot and six feet would be the closest length to the width of the dump.

Q. And if you could use a shorter length culvert, why, of course the estimate of the cost would be less than what you have estimated it?

A. Yes, sir.

Q. It wouldn't be necessary to affect the cattle runway to have a pile bridge thirteen feet long, would it?

A. I don't know as I just get your question.

Q. I will ask it this way:—On this concrete culvert that you have testified to the flat bottom part of it is only about how wide?

A. Oh, I would say two and a half feet,—that is, the flat part, the tread for the cattle.

Q. And it is six feet in the center?

[fol. 132] A. Yes, sir.

Q. Now, wouldn't it be just as effective for a cattle runway if you had a pile bridge that only gave you a six-foot runway, and consequently the cost would be less, wouldn't it, in constructing it?

A. Well, the cost would be as I have given it there,—it would be approximately the same. It would not make much difference because the work would be practically the same.

Q. The work would be the biggest part of the expense, would it?

A. No, not necessarily, but the only thing you would shorten up is your deck. You would have to still have the same number of piles and you would have the back wall behind the piles, but you would shorten up your stringers and save a few ties.

Q. How about your fire hazard? Wouldn't that be less?

A. Whenever you shorten it you decrease the fire hazard.

Q. So that if this bridge was only eight feet long the fire hazard would be considerably less than what it is by thirteen feet long?

A. It would be less.

Q. And can you state as to the strength of the rails, for instance, if you had a pile bridge it would be eight foot long, and the weight that runs on this road would it hold even if the bridge burned from under it?

A. It would not.

Q. That is your estimate?

A. Well, that is the truth. It isn't estimated; we know. I would have to develop the figures for you, but it would not hold, but we just figured a short time ago a span of four feet for a rail, that is, 100-lb. rail, which would not [fol. 133] carry an engine with safety.

Q. What length?

A. Four-foot span.

Q. Now, you testified too that you go to the extent of even having watchmen to guard against fire hazard on bridges; what bridges do you refer to that you have a fire guard?

A. We have one for the Massine bridge up at Duluth. The Blair bridge is another one.

Q. And that is the size of bridges where you keep a watchman?

A. Yes.

Q. You didn't intend to infer that you kept watchmen over those little bridges around here?

A. Oh, no, if the bridge goes out it isn't going to tie traffic up for a month.

Q. Well, there isn't the expense involved in putting it up again here?

A. No.

Q. You have reconstructed several bridges on this branch while you have been civil engineer from Wakefield up to Bloomfield?

A. Yes, sir.

Q. And in those bridges you have constructed of wood in each case?

A. No, that is not true.

Q. In any instance have you built it of concrete?

A. Well, I can't give you an instance but I can take you over the line and show you that all of the bridges are not wooden bridges but there are lots of pile.

Q. Isn't it a fact that you don't put in tile bridges because of the expense involved?

A. No, sir, that is not true.

[fol. 134] Q. Now, you can't show me an instance where you have put one in on this branch, can you?

A. I can by taking you over the branch. I can't specifically tell you just where the locations are.

Q. But you have come here for the purpose of testifying that the expense is too great for the company to put in an underground crossing, haven't you?

A. I have come here to testify as to the expense of putting it in.

Q. And you have looked up the record for that purpose, haven't you?

A. Yes, sir.

Q. Have you any experience as to which would be the best crossing from the standpoint of the farmer who is using it, a pile runway or a concrete one?

A. No, I haven't. From the farmer's standpoint I haven't.

Q. You testified too that there was great danger—damages to the company on account of cloudburst when you put in these pile bridges, didn't you,—more so than concrete?

A. Yes, sir.

Q. And you have been out and viewed this place where this contemplated crossing is?

A. I have.

Q. Do you consider there is any danger there of cloudburst in either case?

A. No, there is not.

Q. So that testimony wouldn't have reference to this particular case at all?

A. No, sir.

Q. You investigated and found that the grade there is of [fol. 135] sufficient height so that a crossing can be put in very readily?

A. The grade is sufficient to permit installation of the crossing.

Q. And with reference to whether it would be a concrete one or a pile one, you only base that on the greater fire hazard with the pile bridge than by the concrete one?

A. No, I base it on the general policy of the company in getting away, as I say, just as fast as we can from pile bridges and putting in concrete.

Q. But you as a civil engineer have ideas of your own whether it is the policy of the company or not, haven't you?

A. Yes, sir.

Q. And as a civil engineer now wouldn't you say that about the only advantage of a concrete over a pile bridge would be the fire hazard?

A. No.

Q. In what way would it be more advantageous?

A. Why, there is practically no maintenance cost on the concrete culvert and there is no danger to life or limb from the concrete culvert, whereas there is from a pile bridge or pile span.

Q. Wherein do you figure there is more danger to life on the pile than on the concrete?

A. Why, there are times and instances where between inspection periods the stringers become cracked. A flaw develops in the stringers that can't be seen and it is liable to let a train through.

Q. And at that rate a person is in entire danger of his life when he rides on this train, whether it is all pile bridges?

A. Yes, he is in danger.

Q. You would have it put that way that every man who [fol. 136] rides on your train is in danger of his life when he rides on your train. Do you get all of your concrete culverts from St. Paul, do you say?

A. Yes, sir.

Q. Isn't there some other place where they make them besides St. Paul?

A. At Chicago.

Q. And do you get them because the company has any particular interest in getting them from that particular point?

A. They have not. The company makes them both at St. Paul and Chicago.

Q. It isn't the Railroad Company that manufactures them?

A. No, sir, it is the Massine Products Company.

Q. And they come in six-foot lengths?

A. Everything above forty-eight inches in diameter come in six-foot lengths. Below that they come in eight-foot lengths.

Q. And if a concrete culvert was put through there and it was found that it could be shortened six feet less than you have estimated, the cost would be in proportion to the figures you have given?

A. No, that would be reduced probably in the neighborhood of 125 or 130 dollars. You would still have to put in your false work and dig out for your embankment and those items would remain the same as they would be whether the length is shortened or increased.

Q. You estimate that the labor expense would be about the same then?

A. Yes, the labor expense would be pretty nearly the same.

Q. And the labor is about half of the material, is it not?

A. About half.

Q. So the reduction would be about the proportionate [fol. 137] amount of the cost of the material?

A. About that, yes.

Redirect examination.

By Mr. Dressler:

Q. What about the fire hazard for wooden bridges on account of grass and weeds catching fire alongside the dump?

A. As a fire hazard on account of weeds and grass in the summer time or in the middle of the summer when weeds dry out, it is liable to catch fire from the engine and the fire spread to the bridge.

Q. It is true as to wooden bridges that even where they are covered with crushed rock or gravel, as is frequently done for fire protection, that they burn nevertheless from the top?

A. It is true that the vibration caused by the train passing over the bridges jolts this rock until it exposes part of the wooden top.

Q. What about wooden bridges getting out of line laterally?

A. They very often have to be re-lined and resurfaced.

Q. And when the bridge gets out of line is that an element of danger in the operation of the train?

A. If it gets too bad it is.

Q. Is there any such danger in having a concrete culvert under the track?

A. There is not.

Q. What is the fact about the piling of a wooden bridge settling so as to put the bridge out of line up and down?

A. Well, that is very seldom. Once in a while your [fol. 138] caps get soft or the ends of your stringers get soft and let that end down and cause it to get out of surface.

Q. How about the danger to live stock which may get on the right of way from bridges? Do they sometimes fall into the bridges?

A. They have been known to run into bridges ahead of the train.

Q. Of course a thing of that kind would be impossible with a culvert?

A. Yes, sir.

Recross-examination.

By Mr. Peterson:

Q. How do you explain that there would be any danger of cattle getting into the bridge if it was covered with crushed rock or concrete?

A. There would be none.

Q. And with reference to the settling proposition that you spoke of, there is nothing to that, is there, any more than what the creek might settle anywhere?

A. Yes, sir, there is. Whenever our bridge inspector finds a bridge that is out of surface, the cap may be crushed onto the piles, it requires the renewing of a stringer or a cap, and the bridge resurfaced, and a bridge crew is sent there to do that.

Q. As a matter of fact then, any part of the road may deteriorate and need fixing?

A. Yes, sir.

Q. And the ties, where you get a big heavy rain they are liable to settle, aren't they, in places more than others?

[fol. 139] A. Yes, sir.

Q. Did you come up here over your train?

A. I did.

Q. Did it ride smooth?

A. Some places it did, some places it didn't.

Q. And as far as the danger of the settling, there is no more danger to the bridge settling than there would be danger to the ties settling on any place of the dump?

A. Well, you haven't any give on a bridge like you have on a dump. Where a dump settles a little there is more or less give to your ground and it does not bring an abrupt shock, whereas it would with a bridge.

By Commissioner Cook:

Q. These hazards would all be less on an eight-foot bridge than they would on a sixteen or twenty, wouldn't they?

A. Well, I would say yes, because whenever you cut down your pile bridges you cut down your hazards.

By Mr. Peterson:

Q. Now, with reference to the fire danger that weeds may grow along the bridge and start a fire and start fire on the bridge,—haven't you, from a custom and policy of the company, section hands who could go and watch that, to mow the weeds and move them away from the bridges?

A. They are required to mow the weeds from out under the bridges and around the bridges.

Q. So there is no hazard from that point, is there?

A. There is, because there are times when you can't do everything that should be done.

Q. Then as a matter of fact, according to your point of view there is danger of even the ties catching fire when [fol. 140] the weeds are not mowed away; in case the weeds got afire the ties might catch fire and there is danger that even the whole track might burn up.

A. We have never had any track burned up.

Q. The danger isn't as great, but there is some, isn't there?

A. Well, not in this instance.

[fol. 141] AUGUST HOLMBERG, recalled, testified as follows upon further cross-examination:

Cross-examination.

By Mr. Dressler:

Q. Mr. Holmberg, is your farm situated any differently than your neighbor's farm so far as the necessity for an underground crossing is concerned?

A. Why, there is some, I suppose, that is just as bad.

Q. Well, there is nothing peculiar about your situation?

A. I don't know anything about my neighbor's farms particularly but I know the circumstances of mine.

Q. It would simply be a convenience to you,—that is all it amounts to, isn't it?

A. Why, it would be a great convenience.

Q. But it wouldn't be any different under the circumstances than an underground crossing for every farmer? You are not in any different situation than other farmers whose land is divided by the railroad tracks?

A. Oh, some have it a whole lot handier than I have.

Q. How do you mean?

A. The track comes closer to their place and the surface gates are handier.

Q. The farmer has placed his buildings closer to the track?

A. Yes, sir. If my buildings had been on the opposite side of the track there would have been a great deal of difference, but the land was so situated that I couldn't build there. The railroad spoiled that part of the land for building purposes.

[fol. 142] Q. Well, you don't intend to go into the stock business as an exclusive business or anything like that?

A. Nothing more than an ordinary farmer does. We all have to have stock every day in the year.

Q. What kind of stock do you have—thoroughbreds or just common, ordinary stock?

A. I have some thoroughbreds.
Q. How many do you have now?
A. Thirty-five, I think it is.
Q. How many thoroughbreds?
A. Why, really I don't know. They are not registered.
Q. No pedigreed stock at all?
A. No.
Q. Have you ever had any pedigreed stock?
A. Oh, yes.
Q. How recently?
A. I just sold one here about a month ago.
Q. Cattle?
A. Yes, sir. I sold one animal for $90.00 that I paid $200 for.
Q. But your general business is just ordinary farming?
A. Just ordinary farming, yes, sir.

Dedirect examination.

By Mr. Peterson:

Q. Now, Mr. Holmberg, with reference to this crossing, which would be of most convenience to you,—a pile bridge crossing or a concrete one?
A. Why, this pile crossing that he describes here would just be an ideal crossing. It would beat anything you could [fol. 143] put in there, I don't care what you say, and it would be just as safe as the rest of the line into Bloomfield.

Recross-examination.

By Mr. Dressler:

Q. That is, from your standpoint. You don't know anything about railroads, do you?
A. I spent about thirty-five years on the railroad. I worked on bridges on the Burlington for years.
Q. How many years ago?
A. I spent fifteen years in the Burlington shops after I left the bridges.
Q. How long ago was that?
A. It is twenty-three years since I was on the railroad.
Q. And since then railroading has become an entirely different proposition?
A. I know all about the railroad business.

Redirect examination.

By Mr. Peterson:

Q. When was it that you quit working for the railroad?

A. In 1908 I quit working for the railroad.

Q. And you have lived here along this track since that time?

A. Fifteen years.

Q. And has there been any change in the policy of the railroad company with reference to changing its bridges or changing its roadbed during that time?

A. No, sir, not a bit.

Q. And with reference to your neighbors, you don't know unless there is a specific farm that is within your [fol. 144] knowledge that is referred to,—some of them have water and some have not.

A. My neighbor has water on his side; he has water all the time. He can turn his cattle in and let them stay there all summer.

Q. But with reference to your own particular farm in question here, you are testifying to the facts as they exist there?

A. Yes, sir.

Q. And so far as the railroad's policy is concerned, you know nothing about that only what you have seen and observed as to what they have done with regard to the maintenance of their railroad and their bridges?

A. Yes, sir.

Q. And you do know that they have built wooden bridges within the past two years?

A. Yes, sir, and less than that.

Q. And do you know whether they have built any concrete bridges where they have rebuilt or reconstructed?

A. I never saw one on the Northwestern.

Q. That is, on this line along here?

A. Yes, sir.

Witness excused.

[fol. 145] EDWARD E. NELSON, having been first duly sworn, as a witness on behalf of the complainant, testified as follows:

Direct examination.

By Mr. Peterson:

Q. Give your name.

A. Edward E. Nelson.

Q. Where do you live with reference to Mr. Holmberg's farm that has been described here in this case?

A. I live just a mile west of him.

Q. And you are a farmer by occupation?

A. Yes, sir.

Q. And how long have you lived there?

A. I have lived there for seventeen years.

Q. And what is the nature of your farming operation? Is it exclusively farming or do you handle stock also?

A. I handle stock also.

Q. Have you been on Mr. Holmberg's farm and have you been down by the railroad track where he is asking that an underground crossing be constructed?

A. Yes, sir.

Q. Mr. Nelson, what kind of a crossing would be the most serviceable crossing to be put in there from your experience as a farmer?

A. An underground crossing.

Q. And how should it be constructed to accommodate the cattle being passed from one side of the farm or of the track to the other?

A. Well, I think they ought to have a crossing there about 6 x 7.

Q. Which way? Seven feet wide?

[fol. 146] A. Seven high and six wide.

Q. And that would accommodate the cattle and horses to pass under it?

A. Yes, sir.

Q. Do you think that a crossing six foot high would be of sufficient height to accommodate stock passing under there?

A. Well, I would say seven, on account of horses, you know, they are scared to go under places where it is kind

of low. Some horses carry their head away up and if they see it so close to them they may not want to go over there.

Q. From your point of view as a farmer and stock raiser, which crossing would you prefer and which would accommodate the farmer the most,—the pile bridge or a cement culvert?

A. Well, a pile bridge would, just because our stock is more used to them. You take and drive stock to a tile, why, it would be almost impossible to do it at first. I wouldn't say that you can't do it after you have tried it a few times, but our stock is more used to the pile bridges. In my experience at Wakefield we had a railroad bridge over the track there and we took our cattle right under there and they went all right.

Q. A concrete crossing would have to be considerably longer than what the bridge would?

A. Yes, sir.

Q. And it would also be darker and for that reason would not be so easy for the cattle to pass through?

A. No.

Q. You have shipped a good deal over this road for the past seventeen years you have lived here?

A. Yes, sir.

[fol. 147] Q. And you have observed what kind of bridges they are using and have used in the past?

A. Well, pile bridges,—and I have always had good luck, never had no trouble.

Q. You have had experience with fire and you can tell whether there would be danger of a fire hazard by building a bridge or a building or anything of that kind, could you not?

A. Well, I haven't seen any bridge burning.

Q. Well, I mean whether you could tell by your knowledge and observation whether there is danger of fire when you see a wooden structure?

A. No.

Q. But when you see a building around your place you can tell about the danger of fire?

A. Yes, sir.

Q. If the hay and weeds are kept away is there much danger of the wood catching fire?

A. No, sir.

Q. What is the fact with reference to railroad bridges?

Mr. Dressler: Objected to as no foundation laid. This witness is not competent.

Q. The way that the railroads are maintaining their bridges here, if the weeds are cut down by the section men and kept away, is there any danger of destruction by fire?

Objected to as incompetent.
Objection overruled. Exception.

A. No.

Q. Well, if a pile bridge or crossing was made at the place proposed in the petition in this case and it was cov-
[fol. 148] ered with crushed rock, would there be any fire hazard or danger from fire?

Objected to as incompetent.
Objection overruled. Exception.

A. No.

Q. From your knowledge and observation of Mr. Holmberg's farm and his stock that he maintains there, in your opinion is there any need of his having an underground crossing?

A. Yes, sir.

Cross-examination.

By Mr. Dressler:

Q. Of course, you never did any railroading, I take it?

A. No, sir.

Q. You never ran an engine or worked on the section even?

A. No, sir.

Witness excused.

[fol. 149] ARTHUR HALLEEN, having been first duly sworn as a witness on behalf of the complainant, testified as follows:

Direct examination.

By Mr. Peterson:

Q. Where do you live with reference to Mr. Holmberg's farm?

A. My land joins Holmberg's. I am just about a mile east.

Q. You are in the same section as he is?

A. Yes, sir.

Q. And you are familiar with his farm, of course?

A. Yes, sir.

Q. And pass by it every time you go to town?

A. Yes, sir.

Q. And how long have you farmed yours?

A. On that place where I am at now?

Q. Oh, how long have you been engaged in the business of farming?

A. Seventeen years.

Q. And how long have you lived on the place where you live now?

A. Four years.

Q. You own that place?

A. Yes, sir.

Q. Do you handle stock?

A. Yes, sir.

Q. And you know that Holmberg has stock on this farm?

A. Yes, sir.

Q. Have you been down to investigate and look at the place where he is asking that an underground crossing be put through?

[fol. 150] A. No, I haven't investigated it but I have walked across there several times.

Q. You have traveled over this railroad considerably from here to Wayne?

A. Yes.

Q. And you know what kind of a grade and what kind of bridges the railroad company maintains there?

A. Yes, sir.

Q. And what kind of bridges do they maintain?

A. Mostly pile bridges.

Q. Constructed of wood?

A. Yes, sir.

Q. And of late have they adopted a system of covering them with concrete or with crushed rock?

A. Yes, with crushed rock,—is what I see it.

Q. And from your observation or your experience, what is the fire hazard to a bridge constructed of piling and wooden timbers and those wooden timbers covered with sand and crushed rock?

Mr. Dressler: Objected to as no foundation laid and incompetent.

Commissioner Cook: He can give his opinion about it. Of course he isn't testifying as an expert or engineer in the matter.

Exception.

A. I haven't seen any of them burn.

Q. Would there be any danger of the bridge constructed in that manner catching fire?

A. No, there wouldn't be from sparks of an engine if [fol. 151] the grass is kept away.

Q. From your point of view as a farmer and a stockman, what kind of a crossing would be most advantageous from the point of the farmer using it—a concrete culvert about six or seven feet in diameter or a wooden pile bridge?

A. Well, I think the wooden pile bridge would be, according to what these concretes are, because they are narrow at the bottom.

Q. Leaving out the item of expense, the difference in the expense of constructing them which would you say would be the most advantageous if you could have your choice at the same expense?

A. The wooden one would.

Witness excused.

[fol. 152] August Fisher, having been first duly sworn as a witness on behalf of defendant company, testified as follows:

Direct examination.

By Mr. Dressler:

Q. What are your initials?
A. August.
Q. And where do you live?
A. Emerson.
Q. And what is your business?
A. Assistant roadmaster.
Q. For the M. & O. Railroad?
A. For the M. & O. Railroad, yes, sir.
Q. And how long have you done that work?
A. Nine years as assistant roadmaster.
Q. And how long have you been engaged in track work?
A. Thirty-four years.
Q. And have you had experience with wooden bridges?
A. I have.
Q. Now, you just tell us what some of the elements of danger from wooden bridges are.
A. Why, I have seen lots of them burned out. I have seen a culvert on the Norfolk line burned up. That was a four-span bridge at the time, it is a culvert now, and the train happened to see it,—it was during the night too,—that is several years ago.
Q. Have there been any bridges burned on the Omaha line here lately?
A. There was last Sunday, yes, sir.
[fol. 153] Q. Where?
A. It is a culvert two miles north of Craig. That is on the main line.
Q. And how big a culvert was that?
A. That was about 4 x 8. I couldn't tell just exactly, but it was a culvert with about four ties on top of it.
Q. Was there any piling there?
A. No, sir.
Q. Even the wooden culverts burn, do they?
A. Yes, sir, wooden bridges, Mr. Dressler.

Q. And is there any increased danger where it is a pile bridge as against a culvert?

A. Oh, yes.

Q. Would a bridge burn quicker than a culvert will?

A. Yes, sir.

Q. How are the wooden bridges on the M. & O. constructed? Do they have floors in them?

A. Some of them have,—not all of them.

Q. About what percentage of them have crushed rock or gravel surface?

A. Well, I could not say just exactly, but they have been constructed for about four years but they are going to be done away with. There is not going to be a gravel top no more because they cut out the ties,—they have to replace the ties about every three or four years. The gravel gets under them and it cuts the ties. The bolt moves up and down more than the rest of the rail and it cuts them out. We have that proof right there at Emerson now.

[fol. 154] Q. Go ahead and describe fully the difficulties of having gravel or rock tops on these bridges.

A. Well, they use more material and more ties. We have to replace ties rapidly.

Q. And does the fact that these gravel surfaces rot the material out, is that an element of danger in operation?

A. Why, yes, I should think so.

Q. What is the fact about woode*n* bridges getting out of line and out of surface?

A. Well, I have seen—it depends on the height of the bridge. I have seen bridges that went out of line three inches in one day. That was a high bridge. Low bridges are not so bad.

Q. Is there any danger at all from operation where you have a concrete culvert that is completely covered over with dirt?

A. No, there isn't, because they are covered inside the track with ballast or dirt or whatever they have got there.

Q. As a roadmaster do you have occasion to go over the line frequently?

A. Oh, yes, I am going over it constantly.

Q. Do your duties require you to keep a check on the condition of all parts of the roadbed?

A. You bet you,—bridges too.

Q. And supervise the work of the section crews in keeping them in shape?

A. Yes, sir.

Q. What would you say, from a thirty-four years' experience in actual track work, as to whether or not it is economy [fol. 155] in the long run to have wooden bridges?

A. Wooden bridges ought to be done away with some time ago already.

Q. What is the fact as to concrete bridges as compared to wooden bridges from a practical railroading standpoint? Are they better and safer?

A. Oh, yes. They are there forever.

Q. And what territory do you have supervision over as roadmaster ?

A. I have the Norfolk line, the Bloomfield, the Crofton and the Wynot line.

Q. What is the policy of the company with reference to filling up these wooden bridges and putting concrete culverts in their place on those lines?

A. We are filling them up right along; we are filling in.

Q. Where are they?

A. T-53 on the Crofton line is going to be filled up. 63 on the main line is filled up already just a week ago. R-66, that is a six-span bridge, there is a culvert put in there now, —it will be taken out. There are lots more,—I haven't the list here.

Q. Supposing the farmers along the line, wherever the grade is high enough to get in an underground crossing, should demand underground crossings made of piling bridges, what would it do to the railroad as a matter of safety and maintenance?

Mr. Peterson: Objected to as incompetent, irrelevant and immaterial. The witness has not shown himself qualified to testify on that point.

Objection overruled. Exception.

[fol. 156] Q. What would you say as to such a practice? What would it do to the railroad?

A. I suppose there would be men, lots of them, that would want something like that,—a wooden bridge.

Q. What would it do as to making the road safe or unsafe?

A. A woden bridge is not as safe as a culvert, that is a certain thing. You can't get away from it. It was mentioned about putting concrete under your ties. That has been tried,—we tried that, it must have been about three or four years ago, and it was not a success.

Q. Wooden bridges burn, no matter what you cover them with?

A. The jar of the trains,—they will not stand it.

Q. And do concrete or gravel covered bridges burn just the same?

A. Yes, sir; fifty-three, on the main line, burned up two years ago.

Q. And what about fire catching down on the ground where tumble-weeds collect?

A. Well, we try to clean it as quick as we can, but sometimes there is something blows in,—that will happen.

Q. And the fire is a danger that is always present wherever you have a wooden structure?

A. You bet it is.

Cross-examination.

By Mr. Peterson:

Q. Now, Mr. Fisher, from your experience in working for this company, it has been the policy in the past to get along with and use wooden bridges, hasn't it?

A. Oh, they have some wooden bridges and are still driving some of them.

Q. You say they are trying to get away from it and build more concrete?

[fol. 157] A. Yes.

Q. And of course from a fire hazard they are safer?

A. Yes, they are. Nobody can get around it.

Q. Now, from a point of convenience to a farmer, you would agree that it would be better crossing for him if you had a pile bridge than it would be to have one of these concrete ones?

A. No, I don't see where it would be any more convenient. I can show them to you all along where they go through them just as good as any. We have got them in several places.

Q. So the only difference you think would be in the expense of constructing them?

A. Yes, sir, that would be it. It is cheaper to construct a wooden bridge.

Q. So you don't think it would be any harder to have cattle pass through a hole six foot in diameter, about thirty-six feet long, than it would be to go under a wooden bridge just wide enough to hold up the track?

A. No. They go through long culverts there, forty feet long.

Q. You heard the testimony from the engineer as to the difference what the price would be in constructing these different lines, did you not?

A. Oh, no, but I have never figured on that at all.

Q. Well, now, a wooden bridge constructed for about $600 or thereabouts,—what percentage of that cost would you figure the fire hazard would be on the bridge?

A. That is pretty hard to figure. It may burn up the first year.

Q. And it may stand thirty years?

A. Yes, sir.

[fol. 158] Q. What is your experience? I want your experience,—what would be the fire hazard?

A. Why, that is pretty hard to tell.

Q. But you have been in the business over thirty years?

A. And I have seen new bridges burn up.

Q. And you have seen lots of them stand for thirty years?

A. Yes, sir.

Q. And what is the general fire hazard?

A. Why, there is quite a bit. We will have a bridge or two burn up every year.

Q. You are not competent to testify on that,—what percentage the fire hazard would be?

A. No, I have no figures, no.

Q. Well, on these other propositions, they are based mostly on figures that you have got from somebody else?

A. Oh, those estimates on bridges, they are all made in the engineer's office. I have nothing to do with them.

Q. It is something you have read from something that somebody else has figured out?

A. Yes, sir.

Q. It is not taken from your own experience?

A. No, sir.

Q. But the fact is that you have constructed a wooden pile bridge on this branch line here within the past year?

A. Yes, sir.

Q. And you do put in lots of them?

A. Yes, sir, big bridges where there is lots of water.

Q. And the bigger the bridge the larger the fire hazard is?

A. Yes, sir.

[fol. 159] Q. So if you had a small one, from eight to twelve or fourteen feet in length, the fire hazard wouldn't be very great on that, would it?

A. No, it would not be as great as it would on the six-span bridge.

Q. And the same thing about the jar that you testified to and the wear on the bridge,—that would not be so great on the small bridge?

A. No, it might not be.

Q. So these bridges that you testify to, where there was a great hazard and danger of the rock wearing them out, you refer to larger bridges?

A. Yes, sir.

Q. And the same about the fire hazard; of course you took into consideration larger—what we call bridges. This would be more or less of a culvert?

A. Yes. A culvert wouldn't cost as much as a big bridge but we get as much fire hazard because the culvert would burn just as quick if it was on fire as a big bridge.

Q. And do you mean to say that it isn't a business method to cover these wooden structures with crushed rock?

A. I understand they are going to cut it out because it rots the ties and timbers so fast.

Q. You know nothing about it only what you have heard?

A. I have heard that; I don't know nothing about it.

Q. But still you are putting in lots of wooden bridges in places?

A. Well, we have done it in places.

Q. It would break you up in business if you would put in concrete culverts?

A. Well, lots of places you can't put them in. This bridge down below here, that is in a draw where there is lots of water.

[fol. 160] Q. In your testimony too you have taken that into consideration where you put in culverts where there was water and sometimes it was better to put in a culvert?

A. So the culvert would take the water, yes, sir.

Q. Have you been putting in any of these cattle runways on your division?

A. I don't put them in. That comes under the B. & B. department.

Q. You have nothing to do with that?

A. No, sir. That is under the construction.

Exhibits Nos. 1 and 2, being blueprints, and Exhibits 3 and 4, being estimates of cost under basis of construction of 68" x 74" and 84" x 89", respectively, are offered and received in evidence.

[fols. 161 & 162] Reporter's certificates to foregoing omitted in printing.

[fols. 163-165] BEFORE NEBRASKA STATE RAILWAY COMMISSION

CERTIFICATE TO BILL OF EXCEPTIONS

Office of the Nebraska State Railway Commission,
Lincoln, Nebraska

We, Thorne A. Browne, Chairman of the Nebraska State Railway Commission, and Dale P. Stough, official reporter of said Commission, do hereby certify that the foregoing and attached document is the original and a true bill of exceptions in Formal Complaint No. 515, August E. Holmberg v. Chicago, St. Paul, Minneapolis & Omaha Railway Company, to the best of our knowledge and belief.

In Testimony Whereof, we have hereunto set our hands and attached the seal of the Nebraska State Railway Commission at Lincoln, Nebraska, this twenty-seventh day of June, A. D. 1925.

(Signed) Thorne A. Brown, Chairman. Dale P. Stough, Official Reporter. (Seal.)

[File endorsement omitted.]

[fols. 166 & 167] IN SUPREME COURT OF NEBRASKA

No. 24917

AUGUST E. HOLMBERG, Appellee,

v.

CHICAGO, ST. P., M. & O. R. Co., Appellant

Appeal from the Nebraska State Railway Commission

JUDGMENT—July 1, 1927

This cause coming on to be heard upon appeal from the Nebraska State Railway Commission, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said Railway Commission; and it is therefore ordered and adjudged that said judgment of the Railway Commission be, and hereby is, affirmed at the costs of appellant, taxed at $—; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Opinion by Eberly, J.

Rose and Good, J. J., dissenting.

(Signed) Charles A. Goss, Chief Justice.

[fol. 168] IN SUPREME COURT OF NEBRASKA

24917

[Title omitted]

OPINION—Filed July 1, 1927

1. The Nebraska state railway commission is free and vested with full power, in the absence of statutory or constitutional inhibition, to adopt and follow its own rules and course of procedure.

2. In proceedings before such commission which involve either directly or as a necessary consequence the annulment, modification or alteration of a previous order by it

entered, the doctrine of estoppel or res judicata, as usually applied to judgments of courts of record, is without any application whatever.

3. "The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large." Lindemann v. St. Joseph & G. I. R. Co., 113 Neb. 284.

4. It appearing that the provision of Revised Statutes 1866, ch. 25, sec. 106, was in force at the time the defendant secured its right of way by condemnation proceedings, it follows that the defendant company is bound to construct and maintain farm crossings, as defined therein, or as said section may be amended by the state in proper exercise of its police power.

5. Section 5527, Comp. St. 1922, as amended by chapter 167, Laws 1923, construed, and held, to be valid and enforceable, and not to contravene sections 3, 16 or 21, of art. I, Constitution of Nebraska; and that said section, as amended, does not deprive said plaintiff of its property without due process of law or impair the obligations of contract; that it does not take property for private use in vio- [fol. 169] lation of the state Constitution, nor does it deprive plaintiff of its property without due process of law in violation of the federal Constitution.

6. Evidence examined, and held to support the order of the railway commission requiring the construction of an underground cattle pass provided in the order entered by it herein.

[fol. 170] Heard Before Goss, C. J., Rose, Dean, Day, Good, Thompson, and Eberly, JJ.

EBERLY, J.:

August E. Holmberg, hereinafter referred to as plaintiff, owns and resides upon a quarter-section farm situated near Wausa, Nebraska. This farm is bisected by the right of way of the Chicago, St. Paul, Minneapolis & Omaha Railroad Company, hereinafter referred to as defendant. Situated north of defendant's right of way is a depression or

low, wet valley which in a general way parallels the right of way and is useful for pasturage only. It contains some eighteen acres of land and extends across the farm. A branch of this valley extends to the southward intersecting the defendant's line of railway about the center of the farm. At this point of intersection the grade of defendant's roadbed, as shown by the evidence, is approximately nine feet in height. In the present proceeding the plaintiff seeks, under the provisions of section 5527, Comp. St. 1922, as amended by chapter 167, Laws 1923, to compel the construction of an underground cattle pass of sufficient size for the passage of horses, cattle and hogs under the track of the defendant connecting the two halves of his farm. Heretofore there has been an ordinary surface or grade farm crossing maintained by the defendant on the northern part of the farm, but the findings of the commission, which are supported by the evidence, discloses that in its present location this crossing does not answer to the requirements of the farm, and is inadequate for the purpose for which it is constructed and has not been used ordinarily by the plaintiff because in its location it was impracticable. The record [fol. 171] before us also discloses that in 1922 the plaintiff filed a petition before the state railway commission for an order requiring the defendant to construct an underground crossing through the right of way on this farm at the point above described, which was by the commission denied, and that no appeal was prosecuted from such denial. On September 16, 1924, the present proceeding was commenced before the Nebraska state railway commission. After hearing thereon, an order was entered requiring the defendant to construct an "underground cattle pass of sufficient size for the passage of horses, cattle and hogs," etc., and from this order the defendant has appealed.

The first assignment of error at the threshold of this case is that the railway commission erred in refusing to take notice of, or receive in evidence, the record of the former hearing of 1922. This record, duly authenticated, was offered in evidence by the defendant at the present hearing. The commission refused to admit it in evidence, but the offer of proof embraces the complete record of proceeding referred to, and the transcript of same forms a part of the bill of exceptions in the present case. It was conceded on

argument of the present case by the representatives of the commission who appeared in its behalf that the record offered should have been received in evidnce. Without further consideration, for the purpose of this case only, we accept this view of the law. The record of the case, determined in 1922, will therefore be considered as before the court, and entitled to the same consideration as though formally received and considered by the commission at the time the order appealed from was made. It therefore follows that, assuming error to have been committed by the ruling complained of, it cannot be considered as prejudicial in this case.

[fol. 172] In considering the previous determination of the Nebraska state railway commission of the matter now before us, when first presented to that commission by the same parties, it is to be remembered that this commission finds the source of its power in the Constitution. The limitations of its powers, and the proper manner of their exercise, must be determined by the terms of that instrument, and also, as expressed therein, "as the legislature may provide by law." In the exercise of its prerogatives the Nebraska state railway commission is not subject to direction or criticism by the courts, except as what transpires may be a proper subject of judicial review, as bearing upon its orders or "judgments." Also, the commission is free, in the absence of statutory or constitutional inhibition, to adopt and pursue its own rules and course of procedure. Omaha & C. B. Street R. Co. v. Nebraska State Railway Commission, 103 Neb. 695.

So, too, this court is committed to the doctrine that "The State Railway Commission has independent legislative, judicial and executive or administrative powers so far as necessarily involved in the "regulation of rates, service, and general control of common carriers;' and such exercise of power may be controlled or limited by the legislature." In re Lincoln Traction Co., 103 Neb. 229.

But the legal effect of orders entered in exercise of its judicial power has been "expressly controlled and limited by legislative action." By statute it is expressly provided that orders of the commission made upon hearing, such as is now before us, shall be "in force and effect from and after the date fixed by the commission, and shall so remain

until annulled, modified, or reversed by the commission," etc. This language, in connection with the context and other [fol. 173] provisions of the act, sustains the conclusion that in proceedings which involve either directly or as a necessary consequence the annulment, modification or alteration of a previous order entered by the commission, the doctrine of estoppel or res judicata, as usually applied to judicial decisions of courts of record, has no application whatever. The analogy between the control of orders by a court during the term in which they were entered, and the control by the commission of its orders at all times, would seem to be complete.

From what has already been set forth, it also follows that whether such proceedings to reverse, modify, or annual shall take the form of an application to reopen the original proceeding in which the order complained of was entered, or whether they shall take the form of an independent proceeding and formally wholly unconnected with the previous proceeding, is a matter of procedure strictly within the constitutional control and determination of the commission. The conclusions here announced seems to be in accord with the weight of authority. Comp. St. 1922, secs. 5496-5498, 5527; Laws 1923, ch. 167; Lindemann v. St. Joseph & G. I. R. Co., 113 Neb. 284; Board of R. R. Commissioners v. Atchison, T. & S. F. R. Co., 8 I. C. C. Rep. 304; Cattle Raisers Ass'n. v. Chicago, B. & Q. R. Co., 12 I. C. C. Rep. 507; Goss v. Director General, 73 I. C. C. Rep. 649; Bell & Zoller Coal Co. v. Baltimore & O. S. W. R. Co. 74 I. C. C. Rep. 433; Motor Transit Co. v. Railroad Commission, 189 Cal. 573; Stratton v. Railroad Commission, 186 Cal. 119; 2 Freeman, Judgments (5th ed.) Secs. 712, 713.

It is the defendant's further contention that, the right of way having been condemned and paid for, the legislature [fol. 174] is "without power thereafter to compel the railroad to expend substantial sums of money for the convenience of such landowner or his grantee." It would seem that the question suggested is not fully presented by the record in this case. It is, however, stated by the defendant in its brief that its right of way was obtained by the usual condemnation proceedings. This is tacitly conceded by plaintiff's failure to deny either in oral argument or written brief. If we take judicial notice of this fact, pos-

sibly it will not be disputed that this right of way was obtained prior to 1921 at a time when the following statute was in full force: "When any person owns land on both sides of any railroad, the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same." Rev. St. 1866, ch. 25, sec. 106.

Accepting the above assumptions as in accord with the facts in the instant case, then the damages for the land condemned were assessed in view of the provisions quoted, and the amount of recovery was necessarily diminished because of the terms of this statute. It follows that the railroad company is bound to construct and maintain a "farm crossing" defined by statute which, in terms at least, does not purport to describe a "grade crossing" nor preclude a further definition of "adequate means of crossing the same" by the state in proper exercise of its police power. Lindemann v. St. Joseph & G. I. R. Co., supra, would appear opposed to defendant's contention and controlling on this branch of the case.

However, the question under consideration naturally leads to and suggests the further contention made by the defendant that section 5527, Comp. St. 1922, as amended by chapter 167, Laws, 1923, is unconstitutional and void, being in violation of sections 3, 16, and 21 art. I, Constitution of [fol. 175] Nebraska, and being in violation of the Fourteenth amendment to the Constitution of the United States; that is, it deprives plaintiff of its property without due process of law; it impairs the obligations of contract; it takes private property for private use in violation of the state Constitution; and it deprives plaintiff of its property without due process of law in violation of the federal Constitution.

The application of the principles of constitutional law upon which the defendant bases its contention to the facts in this case discloses that the fundamental question involved here is the right of the state, by the exercise of its police power, to eliminate the perils of grade crossings. The principles themselves are well established. As applied in the precedents found in the court of controlling jurisdiction, it would seem that the validity of the statutes attacked must be sustained.

Mr. Justice Hughes, in delivering the opinion of the supreme court of the United States in Chicago, M. & St. P. R. Co. v. City of Minneapolis, 232 U. S. 430, said "It is well settled that railroad corporations may be required, at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways." Other specific illustrations of the application of this established rule to the elimination of grade crossings are Davis v. County Commissioners, 153 Mass. 218; New York & N. E. R. Co. v. Bristol, 151 U. S. 556; Selectmen of Norwood v. New York & N. E. R. Co., 161 Mass. 259; Illinois C. R. Co. v. Copiah County, 81 Miss. 685; City of Harriman v. Southern R. Co., 111 Tenn. 538; St. Louis & S. F. R. Co. v. Fayette-[fol. 176] ville, 75 Ark. 534; Chicago, B. & Q. R. Co. v. People, 200 U. S. 561; Cincinnati, I. & W. R. Co. v. Connersville, 218 U. S. 336; Missouri P. R. Co. v. City of Omaha, 235 U. S. 121. See, also, Denver & R. G. R. Co. v. City & County of Denver, 250 U. S. 241; Erie R. Co. v. Board of Public Utility Commissioners, 254 U. S. 394; Chicago, R. I. & P. R. Co. v. Public Service Commission, 287 S. W. (Mo.) 617; Richmond F. & P. R. Co. v. City of Richmond, 133 S. E. (Va.) 800.

In a later case, Justice Holmes, in delivering the opinion of the supreme court of the United States in Erie R. Co. v. Board of Public Utility Commissioners, 254 U. S. 394, made use of the following language: "Grade crossings call for a necessary adjustment of two conflicting interests, that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the pubile is invited and that it necessarily frequents, the state, in the care of which this interest is and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever

may be the cost of the parties introducing the danger. That is one of the most obvious cases of the police power, or to put the same proposition in another form, the authority of the railroads to project their moving [fol. 177] masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. Denver & R. G. R. Co. v. City and County of Denver, 250 U. S. 241. To engage in interstate commerce the railroad must get onto the land, and to get onto it must comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. Denver & R. G. R. Co. v. City and County of Denver, 250 U. S. 241; Union Dry Goods Co. v. Georgia Public Service Co., 248 U. S. 372; Louisville & N. R. Co. v. Mottley, 219 U. S. 467; Northern P. R. Co. v. State 208 U. S. 583; Manigault v. Springs, 199 U. S. 473. If the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortunes the stopping may produce. Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396. Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty. In the opinion of the courts below the evidence justified the conclusion of the board that the expense would not be ruinous. Many details as to the particular situation of this road are disposed of without the need [fol. 178] of further mention by what we have said thus far. The plaintiff in error discusses with considerable detail the effect of the changes upon private sidings. But its rights in respect of these are at least no greater than those in respect of the main line and are covered by the preceding discussion."

A consideration of cases above cited discloses that the source of the state's authority to adopt regulations for public saftey at grade crossings is the police power of the state, and that the elimination of grade crossings is within the scope of that power. The fundamental fact upon which its existence is justified is that its exercise promotes the safety of either or both of two distinct classes, (1) the passengers transported by the railways, and (2) travelers proceeding over the "intersected way." These considerations apply to "farm grade crossings." It must be conceded that each of these, in greater or less degree, is a place of potential danger. Indeed, some farm crossings, because of peculiar situation, may impose greater perils upon the public there in course of transportation, as well as upon persons and property on the premises where situated, than such as are incidental to usual grade crossings upon public highways. The regulation and elimination of farm grade crossings must therefore be deemed properly within the scope of the police power. The doctrine cannot be gainsaid that the police power of a state under federal and state constitution, when exercised in the interest of public safety, is unlimited except by the requirement that the exercise be not capricious or wanton or unreasonable. The extent and conditions upon which this power will be exercised obviously is a matter of legislative discretion on the part of the state. It [fol. 179] follows that authorities set forth herein are applicable to the present case and controlling, and that section 5527, Comp. St. 1922, as amended, is valid and enforceable.

The last proposition for consideration is embraced in the question, "Is the order of the railway commission reasonable in view of the peculiar circumstances of the case?" The authorities upon the question here involved are not numerous. Elliott on Railroads makes use of the following language as applicable thereto: "Communication from one part of a landowner's property to another part, which has been cut off by a railroad right of way, is often provided for by passways and subways constructed under the tracks. As a rule, such passways and subways are more convenient for the landowner, and are at the same time much safer for the railway company, for collisions and injuries at such crossings are practically reduced to a minimum. There

are but few adjudicated cases as to whether or not a company can be compelled to furnish a crossing by means of a passway or subway under the track. * * * It has, however, been held, and correctly, we think, that where a railroad company was required to construct farm crossings, and it appeared that the track was on a high embankment, and there was a natural depression through which a subway could be more conveniently constructed than a grade crossing, such subway would be ordered constructed." 3 Elliott, Railroads (3d ed.) 476. Beardsley v. Lehigh Valley R. Co., 142 N. Y. 173; 36 N. E., 877; 20 N. Y. Supp., 458; Van Wagner v. Central N. E. & W. R. Co., 80 Hun. (N. Y.), 278; 30 N. Y. Supp., 165; Jones v. Seligman, 81 N. Y. 190; Powell v. Atchison, T. & S. F. R. Co., 215 Mo., 339; 114 S. W., 1067. [fols. 180 & 181a] We are also convinced from a careful examination of the record that, in view of the circumstances therein set forth, the order entered by the railway commission requiring the construction of the underground cattle pass is not unreasonable, and that the order of the Nebraska state railway commission so directing must be, and is, in all things affirmed.

Rose and Good, JJ. dissent.

[fol. 181b] Petition for rehearing and brief in support thereof, covering 25 pages, filed August 2, 1927, omitted from this print. It was denied and nothing more by order September 30, 1927.

[fols. 182 & 183] In Supreme Court of Nebraska

[Title omitted]

Order Denying Rehearing—September 30, 1927

This cause coming on to be heard upon motion of appellant for a rehearing herein, was submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, ordered and adjudged that said motion

for rehearing be, and hereby is, overruled and a rehearing herein denied.

(Signed) Charles A. Goss, Chief Justice.

[fol. 184] Exhibit "A." Geo. H. Turner, Deputy Clerk.

In Supreme Court of Nebraska

[Title omitted]

Petition for a Writ of Error—Filed October 6, 1927

To Honorable Charles A. Goss, Chief Justice of the Supreme Court of Nebraska.

Comes now Chicago, St. Paul, Minneapolis and Omaha Railway Company by its Attorney, and respectfully shows to the Court that on the first day of July, 1927, a judgment was entered by the Supreme Court of Nebraska affirming and approving an order of the Nebraska State Railway Commission against your petitioner and said judgment of affirmance became final on the 30th day of September, 1927, when said Court denied a petition for rehearing duly filed in accordance with the rules of said Court.

Your petitioner, feeling itself aggrieved by the said order of the Nebraska State Railway Commission and the judgment of said Court confirming the same, hereby petitions the Court for an order allowing him to prosecute a writ of error to the Supreme Court of the United States under the laws of the United States in such case made and provided.

Wherefore, your petitioner prays that a writ of error may be issued in the name of the Supreme Court of the United States directed to the Supreme Court of the State of Nebraska for the correction of the errors complained or and herewith assigned, that an order be entered duly allowing said writ of error and fixing the amount of security to be given by plaintiff in error, conditioned as the law directs [fols. 185 & 186] and that upon the giving of such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Supreme Court of the United States.

Wymer Dressler, R. D. Neely, Attorney- for Plaintiff in Error.

Writ of Error granted this 6th day of October, 1927, and supersedeas bond fixed in the sum of Two Thousand Dollars ($2,000.00).

Charles A. Goss, Chief Justice of the Supreme Court of Nebraska.

[fol. 187] EXHIBIT "B." GEO. H. TURNER, DEPUTY CLERK.

[Title omitted]

ASSIGNMENTS OF ERRORS—Filed October 6, 1927

Comes now Chicago, St. Paul, Minneapolis and Omaha Railway Company in the above entitled cause, and in connection with its petition for a writ of error in this cause assigns the following errors which the plaintiff in error avers occurred and exist in the order of the Nebraska State Railway Commission as the same is affirmed by the Supreme Court of Nebraksa, and upon which plaintiff in error relies to reverse the judgment entered herein as appears of record.

I

The Supreme Court of Nebraska erred in holding and deciding that Section 5527 Compiled Statutes of Nebraska for 1922, as amended by Chapter 167 Laws of Nebraska 1923, does not violate the Fourteenth Amendment to the Constitution of the United States nor deprive plaintiff in error of its property without due process of law nor take private property for private use without compensation.

II

The Supreme Court of Nebraksa erred in holding and deciding that Section 20 of Article 4 of the Constitution of Nebraska creating the State Railway Commission as construed by the said Court in its opinion in this cause does not deny to plaintiff in error equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Plaintiff in error contends that equal protection of the law is denied by said provision of

the State Constitution as construed by the Court in this [fol. 188] cause for the following reasons:

The people in adopting the Constitution of the State of Nebraska constructed a form of government for the citizens generally, whereby the exercise of despotic and arbitrary power is rendered impossible by a clear division and separation of the sovereign power into separate departments, the legislative, the executive and judicial, and declaring that "no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." (Art. II, Constitution of Nebraska.) Article III then vests the legislative power in the legislature, reserving to the people the right of initiative and referendum. Article IV, Section I, designates who the executive officers of the state shall be. Article V vests the judicial power in the Courts. This form of government for the citizens generally accords with fundamental notions of civil liberty. Notwithstanding this careful protection of the liberty of citizens generally, the people of the state by Section 20 of Article IV of the Constitution, as construed by this Court, have denied to appellant and other railroads the protection of Article II of the Constitution, by conferring upon the State Railway Commission, "independent legislative, judicial and executive or administrative powers," and "in the exercise of its prerogatives, the Nebraska State Railway Commission is not subject to direction or criticism by the Courts," so far as relates to "regulation or rates, service and general control of common carriers." Thus appellant and other railroads are left to the mercy of despotic and arbitrary power of three men exercising sovereign power so far as the vital rights and interests of railroads are concerned. This is a denial of equal protection of the laws at the hands of the state as required by the 14th Amendment to the Constitution of the United States.

[fols. 189 & 190] III

The Supreme Court of Nebraska erred in holding and deciding that the order of the Nebraska State Railway Commission appealed from in this case is not unreasonable and

therefore not in violation of the Fourteenth Amendment to the Constitution of the United States and that it does not deprive plaintiff in error of its property without due process of law nor deny to plaintiff in error equal protection of the law within the meaning of said amendment to the Constitution of the United States.

IV

The Supreme Court of Nebraska erred in holding and deciding that the police power of the State authorizes orders of the Nebraska State Railway Commission requiring grade separation for the purpose of building runways under the railroad track for the exclusive use of hogs and cattle to the same extent that the police power of the State authorizes grade separations for the protection of the traveling public.

V

The Supreme Court of the State of Nebraska erred in holding and deciding that it is not a violation of the obligation of contracts represented by the condemnation award which plaintiff in error paid for the right to construct its railroad track over and across the land of defendant in error for the State thereafter to require the Railway Company at its expense to construct underground runways for hogs and cattle under the tracks of plaintiff in error, as a matter of private convenience for said land owner.

Wherefore, plaintiff in error prays that the judgment of the Supreme Court of Nebraska and the order of the Nebraska State Railway Commission be reversed.

Wymer Dressler, R. D. Neely, Attorneys for Plaintiff in Error.

[File endorsement omitted.]

[fols. 191-193] Bond on writ of error for $2,000, approved and filed October 6, 1927, omitted in printing.

[fols. 194-197] EXHIBIT "C." GEO. H. TURNER, DEPUTY CLERK

IN SUPREME COURT OF NEBRASKA

[Title omitted]

WRIT OF ERROR—Filed October 6, 1927

UNITED STATES OF AMERICA, ss:

The President of the United States to the Chief Justice and Judges of the Supreme Court of Nebraska, Greeting:

Because in the record and proceedings and in the judgment rendered in a certain cause in the Supreme Court of Nebraska before you between Chicago, St. Paul, Minneapolis and Omaha Railway Company, plaintiff in error, and August E. Holmberg, defendant in error, a manifest error has happened to the damage of said Chicago, St. Paul, Minneapolis and Omaha Railway Company, plaintiff in error, as by its complaint appears, and we being willing that error, if any hath been, should be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same where said Court is sitting at Washington, D. C., within 30 days from the date hereof, so that said record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct the errors what of right and according to the laws and constitution and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States this 6th day of October, 1927.

R. C. Hoyt, Clerk of the United States District Court for the District of Nebraska, Lincoln Division, by J. B. Nickerson, Deputy. (Seal United States District Court, District of Nebraska, Lincoln Division.)

[fols. 198-201] Citation, in usual form, showing service on P. H. Peterson, filed October 10, 1927, omitted in printing.

[fol. 202] In Supreme Court of the United States

Statement of Points Relied upon by Plaintiff in Error and Præcipe for Printed Record—Filed November 17, 1927

Comes now plaintiff in error, pursuant to Paragraph 9, Rule 11, and states that the following points will be relied upon by the plaintiff in error for reversal of this case in this Court.

I

The Supreme Court of Nebraska erred in holding and deciding that Section 5527 Compiled Statutes of Nebraska for 1922, as amended by Chapter 167 Laws of Nebraska 1923, does not violate the Fourteenth Amendment to the Constitution of the United States nor deprive plaintiff in error of its property without due process of law nor take private property for private use without compensation.

II

The Supreme Court of Nebraska erred in holding and deciding that Section 20 of Article 4 of the Constitution of Nebraska creating the State Railway Commission as construed by the said Court in its opinion in this cause does not deny to plaintiff in error equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Plaintiff in error contends that equal protection of the law is denied by said provision of the State Constitution as construed by the Court in this cause for the following reasons:

The people in adopting the Constitution of the State of Nebraska constructed a form of government for the citizens generally, whereby the exercise of despotic and arbitrary [fol. 203] power is rendered impossible by a clear division and separation of the sovereign power into separate departments, the legislative, the executive and judicial, and

declaring that "no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." (Art. II, Constitution of Nebraska.) Article III then vests the right of initiative and referendum. Article IV, Section I, designates who the executive officers of the state shall be. Article V vests the judicial power in the Courts. This form of government for the citizens generally accords with fundamental notions of civil liberty. Notwithstanding this careful protection of the liberty of citizens generally, the people of the state by Section 20 of Article IV of the Constitution, as construed by this Court, have denied to appellant and other railroads the protection of Article II of the Constitution, by conferring upon the State Railway Commission, "independent legislative, judicial and executive or administrative powers," and " in the exercise of its prerogatives, the Nebraska State Railway Commission is not subject to direction or criticism by the Courts," so far as relates to "regulation or rates, service and general control of common carriers." Thus appellant and other railroads are left to the mercy of despotic and arbitrary power of three men exercising sovereign power so far as the vital rights and interests of railroads are concerned. This is a denial of equal protection of the laws at the hands of the state as required by the Fourteenth Amendment to the Constitution of the United States.

III

The Supreme Court of Nebraska erred in holding and deciding that the order of the Nebraska State Railway Commission appealed from in this case is not unreasonable and therefore not in violation of the Fourteenth Amendment to the Constitution of the United States and that it does not deprive plaintiff in error of its property without [fol. 204] due process of law nor deny to plaintiff in error equal protection of the law within the meaning of said amendment to the Constitution of the United States.

IV

The Supreme Court of Nebraska erred in holding and deciding that the police power of the State authorizes orders

of the Nebraska State Railway Commission requiring grade separation for the purpose of building runways under the railroad track for the exclusive use of hogs and cattle to the same extent that the police power of the State authorizes grade separation for the protection of the traveling public.

V

The Supreme Court of the State of Nebraska erred in holding and deciding that it is not a violation of the obligation of contracts represented by the condemnation award which plaintiff in error paid for the right to construct its railroad track over and across the land of defendant in error for the State thereafter to require the Railway Company at its expense to construct underground runways for hogs and cattle under the tracks of plaintiff in error, as a matter of private convenience for said land owner.

The following parts of the record should be printed to present the foregoing points.

I

The entire record as filed in the Supreme Court of Nebraska on the appeal from the order of the Nebraska State Railway Commission, consisting of pleadings of the parties, all of the evidence and the order of the Nebraska State Railway Commission.

II

The opinion and judgment of the Supreme Court of Nebraska affirming the Commission's order.

III

The motion of the appellant that the Court have a rehearing, and the Court's order denying the same.

[fols. 205 & 206] IV

The petition for Writ of Error, the Writ of Error, the supersedeas bond and citation and service thereof, and the assignment of errors in this Court.

This statement of points relied upon.

Wymer Dressler, Counsel for Plaintiff in Error.

Received copy of the foregoing, and same calls for all of the record which will be necessary to the hearing, except——

—— ——, Counsel for Defendant in Error.

STATE OF NEBRASKA,
County of Knox, ss:

P. H. Peterson being first duly sworn on oath says that he received this Statement and Præcipe from Wymer Dressler Counsel for plaintiff in error, and on the 11th day of November, 1927 he served the same upon the defendant in error, August E. Holmberg, by delivering to him in person a true copy of the same; done at Wausa, in Knox County, Nebraska, and that he stated that he had no desire for any further records being embodied therein than as above set out.

P. H. Peterson.

Subscribed in my presence and sworn to before me this 11th day of November, 1927. Anna M. Peterson, Notary Public. Notarial Seal, Anna M. Peterson, Knox County, Nebraska. Commission expires July 29, 1930.)

[fol. 207] [File endorsement omitted.]

Endorsed on cover: File No. 33,063. Nebraska Supreme Court. Term No. 611. Chicago, St. Paul, Minneapolis and Omaha Railway Company, plaintiff in error, vs. August E. Holmberg. Filed November 10th, 1927. File No. 33,063.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1927

NO. 611

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Plaintiff in Error,

vs.

AUGUST E. HOMBERG,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

WYMER DRESSLER,
ROBERT D. NEELY,
Of Omaha, Nebraska,
RICHARD L. KENNEDY,
Of St. Paul, Minnesota,
R. N. VAN DOREN,
Of Chicago, Illinois,
Counsel for Plaintiff in Error.

THE COCKLE PRINTING CO., LAW BRIEFS, OMAHA, NEB.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1927

NO. 611.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

Plaintiff in Error,

vs.

AUGUST E. HOMBERG,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF PLAINTIFF IN ERROR.

REFERENCE TO STATE COURT DECISION.

The opinion of the Supreme Court of Nebraska in this case is not yet reported in the official reports, but is found in 214 Northwestern Reporter 746, being case No. 24917, decided July 1, 1927. (R. 108)

GROUNDS ON WHICH JURISDICTION INVOKED.

The case is here on writ of error to the Supreme Court of Nebraska. The judgment of that court is dated July 1, 1927 (R. 108). Plaintiff in error claimed in the state court that Section 5527 Compiled Statutes of Nebraska 1922, as amended by Chapter 167 Laws of Nebraska 1923, seeking to compel railroads to build underground farm crossings for the convenience of land owners at railroad expense violates the due process clause of the 14th Amendment to the Federal Constitution, and the decision of the Supreme Court of Nebraska was in favor of the validity of said statute. Plaintiff in error also claimed in the Supreme Court of Nebraska that the order of the Nebraska State Railway Commission requiring the building of such underground crossing was unreasonable and violates the due process clause of the 14th Amendment to the Federal Constitution and therefore void, and the decision of the state court was in favor of the validity of said order. Plaintiff in error also claimed in the Supreme Court of Nebraska on rehearing (R. 123) that Section 20 of Article IV of the Constitution of Nebraska creating the Nebraska State Railway Commission as construed by the Supreme Court of Nebraska in this case is in violation of the equal protection clause of the 14th Amendment to the Federal Constitution, but the decision of the Supreme Court of Nebraska overruling said motion is in favor of the validity of said state constitutional provision.

Great Northern Railway Company vs. Cahill,
253 U. S. 71.

STATEMENT OF THE CASE.

August E. Holmberg, defendant in error, is the owner of the Northwest Quarter (NW¼) of Section Twenty-four (24) Township Twenty-nine (29), North, Range Two (2), West of the 6th P. M., in Knox County, Nebraska, having owned the farm for about 15 years (R. 1, 14). The railroad of plaintiff in error bisects this quarter section of land from northwest to southeast and was built many years before defendant in error became the owner of the farm. The land is devoted to ordinary farm purposes (See plat of farm (R. 46)). At the time defendant in error purchased the farm there existed an ordinary surface farm crossing in the northwest part of the quarter section connecting the two halves of the farm (R. 24, 27). This crossing has always been maintained in good condition and is now in good condition for farm uses (R. 47), equipped with suitable gates (R. 29, 47). The land is used for ordinary farming purposes (R. 94) with only the number and kind of ordinary farm livestock thereon (R. 93). This consists of 25 to 35 head of cattle and 4 horses (R. 74, 16), and about 90 head of hogs (R. 16) which is the most that defendant in error has had (R. 74), with no purpose to increase the numbers (R. 75). The farm buildings are located near the southwest corner of the quarter section (R. 71). To reach the northeast half of the farm from the farm buildings, defendant in error must travel or drive his livestock 60 to 80 rods northeast to the private farm crossing (R. 71, 72). On the northeast side of the railroad track the farm is devoted to pasture and hay land and some plow land. There is no evidence in the record that any accident of any kind has ever occurred at this farm crossing and no evidence that

defendant in error has ever made any complaint to the Railway Company concerning the location or condition of the farm crossing. On the northeast side of the farm, defendant in error maintained for a number of years a well and pump to supply water to his livestock (R. 72, 73, 77) in addition to the well and windmill in the southwest part where the buildings are located. There is nothing unusual about this farm or the railroad track which would entitle defendant in error to an underground passageway for his livestock any more than any farmer whose farm is bisected by the railroad would be entitled to such a convenience. (R. 39-40).

However, on March 29, 1922, defendant in error filed a written complaint with the Nebraska State Railway Commission (R. 60), praying that on account of its being "very inconvenient for your applicant to transfer cattle and stock from one side of the track to the other" that the Railway Company be required under the provisions of Section 4, Chapter 261, Laws of Nebraska 1921, to build an underground passageway for the accommodation of plaintiff's livestock.

Plaintiff in error answered this complaint (R. 63). denying such necessity; setting forth that a suitable surface crossing already existed for the accommodation of the farm and that the farmer, under the statute, was not entitled to a second means of crossing said railroad track, and prayed that the complaint be dismissed. The Railway Commission held a hearing on the complaint on the 28th day of June, 1922, and on the 28th day of July, 1922, entered an order containing an opinion and finding of fact (R. 64) dismissing the complaint on the ground "the

evidence does not show that the crossing is inadequate" and "evidence shows that plaintiff already has watering facilities for stock on both sides of the track," and that the present situation is no different than it has existed for twenty years. That the farm is "devoted exclusively to agriculture * * *, has no livestock save such as is incidental to an agricultural farm consisting of 160 acres" and that " a level grade crossing suitably placed with good gates in the fence is provided and maintained for his use directly east of his buildings, permitting him to cross the tracks with his farm machinery of all kinds and with his live stock whenever he desires to reach the east portion of his farm. On the east side the farm is devoted to the cultivation of corn and small grain with a narrow strip of meadow about 30 rods east of the tracks," also "if he had an underground way as prayed for in his application, he would have no immediate use for the same. There is nothing on the east side of the track which could be used for pasture and livestock and there will be no such pasture there until the corn is harvested late in the fall. It is quite apparent that an underground crossing, as asked for by plaintiff, would be a convenience three or four months during each year late in the fall and winter, at a time when the stock on the farm is at liberty to run at large. This convenience, in the judgment of the Commission, is not sufficient to create a necessity that would come within the requirements of the statutes governing such matters."

The Statute, Chapter 261, *Laws of Nebraska* 1921, under which defendant in error made his first complaint is as follows (R. 66):

"Whenever any person owns land on both sides of the right of way of any railroad, such railroad shall provide and keep in repair at least one adequate means for such landowner to cross the right of way. Any interested landowner, with land on both sides of the right of way of any railroad, may file written complaint with the State Railway Commission against any such railroad that the crossing is not adequate, and the commission thereupon shall make such investigation and hold such hearings as may be necessary, and shall issue such orders as it shall deem necessary, proper, and adequate. If circumstances warrant the commission may require overhead, underground, or grade crossings, and require wing fences at underground crossings, but where such special crossings involve an expenditure of more than six hundred dollars, the landowner shall bear one-half the expense in excess of six hundred dollars."

The Commission pointed out in its opinion (R. 67) that the Supreme Court of the State in *Postle vs. C. B. & Q. R. R. Co.*, 98 Neb. 192, had held with reference to this statute that where a surface crossing had been in use by the farmer for a number of years, a different type of farm crossing could not be required "unless changed physical conditions" rendered some other type of crossing necessary, and the Commission concluded:

"After a careful consideration of all the evidence, it is the judgment of the Commission that the real need for an underground way for stock on plaintiff's farm is not sufficiently apparent to require an improvement of this nature at this time."

There was no appeal from this order denying the prayer of the complaint.

Subsequently, and on September 16, 1924, defendant in error filed another complaint (R. 1) before the Nebraska State Railway Commission again praying that plaintiff in error be required to build an underground crossing "as contemplated by Section 5527 of Compiled Statutes of Nebraska for 1922." This section of the Statute as amended by Chapter 167, Laws Nebraska 1923, is as follows:

> "Whenever any person owns land on both sides of the right of way of any railroad, such railroad shall provide and keep in repair at least one adequate means for such land owner to cross the right of way. Any interested land owner with land on both sides of the right of way of any railroad may file written complaint with the State Railway Commission against any such railroad that the crossing is not adequate or is unsafe and dangerous to the life and property of those who use the same, and the commission thereupon shall make such investigation and hold such hearing as may be necessary, and shall issue such order as it shall deem necessary, proper and adequate. If circumstances warrant, the commission may require overhead, underground or grade crossings, and require wing fences at underground crossings, or may require existing crossings to be relocated so as to be safe to those who use them, but where such special crossing involves an expenditure of more than $700.00, the land owner shall bear one-half the expenses in excess of $700.00."

The only substantial change in the statute between the time of the first complaint and the second complaint is that the legislature had increased the initial expense of the improvement which the railroad must bear from $600.00 to $700.00 before the farmer would be called upon to share the expense.

Defendant in error assigned in his second complaint as the reason why he desired an underground crossing which had theretofore been denied him by the Commission, "plaintiff's advanced age and physical infirmity" (R. 3). No change in the physical situation of the land or the railroad was claimed or proved. To this second complaint the Railway Company filed its answer (R. 3) denying the necessity for an underground crossing; setting forth that the farm has a suitable grade crossing maintained in good condition, and that the farmer is only entitled to one crossing; that there has been no change in the situation since the previous order of the Commission denying the demands of defendant in error; that the expense of such an underground crossing would range from about $1,200.00 to about $2,100.00 depending upon the size of the crossing built, and prayed that the complaint be dismissed. The Railway Commission held a hearing on this complaint, and on May 22, 1925, entered an order (R. 7) requiring the Railway Company to build an underground crossing for the use of defendant in error, and in the order required that the Railway Company pay the first $700.00 of the expense of such improvement and that defendant in error pay 50% of the remainder of such expense, all of which was to be supervised by the Railway Commission.

The Company appealed to the Supreme Court of the State from this order, claiming that the order was unreasonable and void, in violation of the 14th Amendment to the Federal Constitution, and that Section 5527, Compiled Statutes of Nebraska, 1922, was likewise void because in violation of the 14th Amendment to the Federal Constitution. The order was affirmed by the Supreme

Court of the state. (R. 108). After the opinion in the case was filed, and within the proper time, the Railway Company asked for a rehearing, setting forth said complaints, and in addition thereto, that the constitutional provision of the state creating the State Railway Commission as construed by the Court in the opinion in the case, declaring the right of the Commission to exercise independent legislative, executive and judicial powers, was in violation of the equal protection clause of the 14th Amendment to the Federal Constitution. A rehearing was denied. (R. 117).

The record shows that the sole purpose of the proposed underground crossing is to serve the personal convenience of the present landowner. At the second hearing before the Railway Commission, defendant in error testified: That he is sixty years old (R. 14) and his present family at home consists of his wife, 59, and his daughter, 24. (R. 15). That he has no water supply for his live stock on the east side of the railroad track. (R. 16). (Apparently it was discontinued after the first hearing and before the second one.)

And that it is "too much trouble and bother" to drive cattle back and forth over the track. (R. 18 and 19). And that if he had an underground crossing "it would be a big advantage to me, because I would not have to go and get the cattle when I wanted them at night, and I thought that when they wanted water they would come home for it, and that would be quite a big advantage, and then they would go back to the pasture again." (R. 20). That he does not want to drive his cattle over the private crossing because "it is cultivated land on both sides." (R. 25). That he cannot think of

any difference in conditions now from what they were two years ago when the previous hearing was held (R. 26). That he has been using the pasture east of the railroad track for sixteen years. (R. 28). The idea of an underground passageway "is to get a passageway so that the cattle can go back and forth without being watched all of the time." (R. 28). The only difference in conditions now and what they were two years before is that the defendant in error is two years older. (R. 30). That it is about one thousand feet from his farm buildings to the private crossing already there. (R. 31). And he again stated that his reason for wanting an underground pass for the cattle is "because it is too much trouble to have them taken back and forth, and then to stay in the yard overnight." (R. 58). That a 74-inch pipe would be large enough for his purposes, and that assuming the cost of the cattle pass would be $1,606.00, that after the railway company paid the first $700.00, he would be willing to pay 50 per cent of the balance, or $453.00. (R. 59).

A neighbor, Floyd Thorell, testified for the defendant in error, (R. 39).

Q. "Mr. Holmberg's situation is not any different than every farmer has who works fields on both sides of the railroad track, is it?"

A. "It is, in a way. He wants to have an underground crossing to get his milk cows over."

Q. "Well, every farmer who works land on both sides of the track and happens to have a pasture on one side with the farm buildings on the other

side is in the same situation that Mr. Holmberg is?''

A. ''I suppose he would be.''

Q. ''There would not be anything peculiar about Mr. Holmberg's situation.''

A. ''Well, I wouldn't say that. I wouldn't say that there is.''

The railway company's evidence showed that the cost of installing this proposed underground crossing is $1,606.00. (R. 52). And plaintiff in error claims that whatever inconvenience results from dividing the farm by the railroad was paid for in the condemnation award when the right-of-way was acquired. (R. 43). That since the evidence shows defendant in error has actually been able to use the east side of his farm by means of the private surface crossing all these years, (R. 76) the efficiency of the surface crossing is conclusively established.

There is nothing in the evidence or the order of the Railway Commission or the opinion of the Supreme Court of Nebraska indicating any willingness or purpose that Mr. Holmberg is expected to take any legal steps to acquire the right to establish another right of way across the railroad property, or to compensate the railway company therefor. Rather, the proposition seems to be that the order of the Railway Commission is sufficient to confer upon Mr. Holmberg title to the right of passage under the railway tracks in perpetuity for his private convenience without compensation to the railway company. Plaintiff in error denies the right of the state or any of its agencies to condemn private property for private use without compensation.

ERRORS RELIED UPON.

Plaintiff in error relies upon the following errors of the Supreme Court of Nebraska in this case.

I.

The Supreme Court of Nebraska erred in holding and deciding that Section 5527 Compiled Statutes of Nebraska for 1922, as amended by Chapter 167 Laws of Nebraska 1923, does not violate the Fourteenth Amendment to the Constitution of the United States nor deprive plaintiff in error of its property without due process of law nor take property for private use without compensation.

II.

The Supreme Court of Nebraska erred in holding and deciding that Section 20 of Article IV of the Constitution of Nebraska creating the State Railway Commission as construed by the said Court in its opinion in this cause does not deny to plaintiff in error equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Plaintiff in error contends that equal protection of the law is denied by said provision of the State Constitution as construed by the Court in this cause for the following reasons:

The people in adopting the Constitution of the State of Nebraska construed a form of government for the citizens generally, whereby the exercise of despotic and arbitrary power is rendered impossible by a clear division and separation of the sovereign power into separate departments, the legislative, the executive and judicial, and declaring that "no person or collection of persons being one of these departments shall exercise

any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." (Art. II, Constitution of Nebraska.) Article III then vests the right of initiative and referendum. Article IV, Section I, designates who the executive officers of the state shall be. This form of government for the citizens generally accords with fundamental notions of civil liberty. Notwithstanding this careful protection of the liberty of citizens generally, the people of the state by Section 20 Article IV of the Constitution, as construed by the state Court, have denied to appellant and other railroads the protection of Article II of the Constitution, by conferring upon the State Railway Commission, "independent legislative, judicial and executive or administrative powers," and "in the exercise of its prerogatives, the Nebraska State Railway Commission is not subject to direction or criticism by the Courts," so far as relates to "regulation or rates, service and general control of common carriers." Thus appellant and other railroads are left to the mercy of despotic and arbitrary power of three men, exercising sovereign power so far as the vital rights and interests of railroads are concerned. This is a denial of equal protection of the laws at the hands of the state as required by the Fourteenth Amendment to the Constitution of the United States.

III.

The Supreme Court of Nebraska erred in holding and deciding that the order of the Nebraska State Railway Commission appealed from in this case is not unreasonable and therefore not in violation of the Four-

teenth Amendment to the Constitution of the United States and that it does not deprive plaintiff in error of its property without due process of law nor deny to plaintiff in error equal protection of the law within the meaning of said amendment to the Constitution of the United States.

IV.

The Supreme Court of Nebraska erred in holding and deciding that the police power of the State authorizes orders of the Nebraska State Railway Commission requiring grade separation for the purpose of building runways under the railroad track for the exclusive use of hogs and cattle to the same extent that the police power of the State authorizes grade separation for the protection of the traveling public.

V.

The Supreme Court of the State of Nebraska erred in holding and deciding that it is not a violation of the obligation of contract represented by the condemnation award which plaintiff in error paid for the right to construct its railroad track over and across the land of defendant in error for the State thereafter to require the Railway Company at its expense to construct underground runways for hogs and cattle under the tracks of plaintiff in error, as a matter of private convenience for said land owner.

SUMMARY OF ARGUMENT.

I.

A railroad right of way acquired by condemnation or purchase and in actual use for railroad purposes cannot be taken by the State even for a public purpose until just compensation has been made to the owner.

Delaware L. & W. Railway Co. vs. Town of Morristown, U. S. Supreme Court, decided February 20, 1928.

M. K. & T. Railway Co. vs. Oklahoma, 271 U. S. 303-308.

II.

The State cannot take such property for private purposes at all, except by consent of the owner.

Delaware L. & W. Ry. Co. vs. Town of Morristown, supra.

III.

Such a taking of property without compensation is an infringement of the constitutional rights of the owner guaranteed by the due process clause of the 14th Amendment to the Federal Constitution.

(Cases supra.)

IV.

The order of the Nebraska State Railway Commission whether based on said statute, or upon the independent legislative power of the Commission, seeking to take a part of the railroad company's right of way without com-

pensation, whether for a public or private purpose, is arbitrary and void as in violation of the 14th Amendment of the Federal Constitution.

(Cases supra)

Great Northern Railway Co. vs. Cahill, 253 U. S. 71.

Great Northern Railway Co. vs. Minnesota, 238 U. S. 340.

V.

Even under Nebraska law for citizens generally, the State cannot open a public road or way without first making compensation to private land owners for property so taken or damaged.

Van Wagging vs. Deeter, 78 Neb. 282,

Scottsbluff County vs. Land Company, 93 Neb. 805,

Rule vs. Sioux County, 94 Neb. 736.

VI.

And cannot take private property for private purposes at all.

Jenal vs. Green Island Draining Co., 12 Neb. 166.

Welton vs. Dickson, 38 Neb. 774.

VII.

The police power of the State to require grade separations, at railroad expense, where the railroad and a public road or street crosses is distinguished from the at-

tempted exercise of such power to take a private way for livestock, without compensation, and at railroad expense. The State court's opinion is this case confuses these principles.

VIII.

A private runway for livestock under the railroad track is not a public highway within the meaning of the police power referred to.

IX.

The proposed runway under the track is not capable of use by the land owner for teams, vehicles or machinery, hence the surface crossing is still necessary, which fact destroys the theory that grade separation will eliminate the possibility of accidents.

X.

A fair construction of Section 5527 Compiled Statutes of Nebraska, 1922, as amended, shows that it was the legislative purpose to have only one crossing capable of use by the land owner for all purposes. Such has heretofore been the construction of the statute by the state supreme court.

Omaha & R. V. Railroad Co. vs. Severin, 30 Neb. 318.

Postle vs. C. B. & Q. R. R. Co., 98 Neb. 192.

XI.

To compel the railroad to spend about $1,200.00 now, in addition to forfeiture of the necessary ground on its

right of way, to build a stock runway for the land owner's private convenience, is a violation of the award or judgment in the condemnation proceedings at the time the railroad right of way was acquired; all elements of inconvenience to the land owner having been fully included in such award.

Section 5278 *Compiled Statutes of Nebraska* 1922,

Section 5283, Same,

C. B. & Q. vs. O'Connor, 42 Neb. 90,

Churchill vs. Beethe, 48 Neb. 87,

Beckman vs. Lincoln & Northwestern Railroad Co., 85 Neb. 228.

XII.

Assuming that Section 5527 Compiled Statutes of Nebraska, 1922, as amended by Chapter 167 Laws of Nebraska, 1923, is void as applied in this case: The only legislative power left in support of the order of the railway commission is its "independent legislative power" under Section 20, Art. IV of the Nebraska Constitution.

It is a denial of equal protection of the law to plaintiff in error and other railroads, in violation of the 14th Amendment to the Federal Constitution, for the people of the State to create for railroads a plan of government which combines all sovereign power, legislative, executive, and judicial, in one Commission; while for citizens generally the sovereign power is separated into distinct departments, none of which may exercise any of the powers properly belonging to the other departments.

Compare *Arts. II, III, IV and V, Nebraska Constitution with Sec.* 20, *Art. IV.*

ARGUMENT.

As we have seen from the statement of the case and an examination of the plat (R. 46) the order of the State Railway Commission requires the Railway Company to cut a new opening in its railroad track about 7 or 8 hundred feet southeast of an already established grade crossing for the private use and convenience of the land owner. There is no suggestion in the record of any desire on the part of the land owner to have the surface crossing moved to a different location. After using this surface crossing for 15 years or all the time he has owned the land, he concludes that it will be more convenient in handling his livestock to have a runway under the track so that he will not be obliged to conduct them across the railroad right of way. For this purpose he wants the Railway Company to give up possession and use of such portion of its right of way as may be necessary to construct this private runway, without compensation for the land taken, and he wants the Railway Company to pay approximately $1,200.00 of the $1,600.00 expense of the actual construction of the proposed cattle pass. The State Railway Commission when first appealed to denied any necessity of the land owner for such a convenience, and the validity of the Statute in question was not therefore raised. But on renewal of the application, the Commission orders the Railway Company to do what the farmer desires, and the Supreme Court of the State has affirmed that order as a reasonable and constitutional requirement. There can be no question that the sole and only purpose of the cattle pass is to serve the private convenience of the land owner. It is not a public way in any respect. The proposed cattle pass cannot be used by any

human being. It is to be a 74 inch reinforced concrete pipe, capable of affording a runway for cattle, horses and hogs. The runway would be incapable of accommodating the farmer's teams, wagons, machinery, etc., which he might desire to conduct over the right of way. These things must still use the surface crossing. There is no evidence that any accident of any kind has ever occurred at the private crossing to either person or property, and none has occurred. The territory is level and the only place on the farm where it would be physically possible to install an underground runway is at the location proposed. Otherwise, a surface crossing could be installed any place within the limits of the farm. The Railway Company acquired its right of way through this farm many years ago by condemnation proceedings. It, therefore, owns the right of way for railroad purposes and is in active use and operation of its right of way for such purpose.

I.

A railroad right of way acquired by condemnation or purchase and in actual use for railroad purposes cannot be taken by the State even for a public purpose until just compensation has been made to the owner.

This principle is so well settled that it has become elementary. The recent case of *Delaware, L. & W. Railroad Company vs. The Town of Morristown,* being No. 147 October 1927 term of this court, decided February 20, 1928, seems to us clearly in point. There the town sought by ordinance to appropriate a part of the railroad station grounds and private driveway for a public hack-stand on the theory that, the ground being devoted to a public use,

the State may appropriate that ground under the police power for a public hack-stand. But this Court said:

> "The police power may be and frequently it is exerted to effect a purpose or consummate an enterprise in the public interest that requires the taking of private property; but, whatever the purpose or the means employed to accomplish it, the owner is entitled to compensation for what is taken from him. The railroad grounds, station, platforms, driveways, etc., are used by the petitioner for the purpose of its business as a common carrier; and, while that business is subject to regulation in the public interest, the property used belongs to petitioner. The State may not require it to be used in that business, or take it for another public use, without just compensation, for that would contravene the due process clause of the Fourteenth Amendment."

In *M. K. & T. Railway Co. vs. Oklahoma,* 271 U. S. 303, an order of the Corporation Commission of Oklahoma requiring the building of an underground crossing for a public street where none had existed before was challenged as in violation of a contract between the railroad and the city which provided that as a part of a compromise involving numerous unauthorized crossings that whenever the City desired to extend Comanche Avenue across the Company's right of way there should be an underground crossing at the expense of the City. The Corporation Commission sought to require the Railway Company in violation of that agreement to bear a portion of that expense. Reviewing the relative rights of the parties, this Court said:

> "When the ordinance was passed, it was the purpose of the parties to get rid of unauthorized

> crossings then in use and to arrange for the extension of platted streets across the tracks and station grounds. It was necessary for the city to obtain rights of way for that purpose; and it was empowered to acquire them by contract, purchase or condemnation. * * * It could not take them without making just compensation to the owner. * * * It was entitled to compensation for any of its property that might be taken or damaged by the construction and use of the crossing."

So that the authority of the State, whether through statute or an order of the State Railway Commission to take a portion of the railroad right of way even for a public highway or street or way must be exercised on the precedent condition that the owner be compensated for the land thus taken.

II.

But when the undisputed purpose is to furnish a new road or way of convenience for a private individual with no possibility that the public can ever have any use of such way, the State has no power to take the property. What property is proposed to be taken by the order of the Commission? First, it is proposed to take the necessary ground across the railroad right of way for the improvement. No compensation is offered, arranged for, nor suggested. On the contrary, the order assumes that the railroad is not entitled to any compensation for this ground although it is being taken to be devoted to the private use of Mr. Holmberg in perpetuity. Second, the order of the Commission proposes to take from the railroad company approximately $1,200.00 representing the

larger part of the cost of the proposed convenience for Mr. Holmberg. The railroad right of way is devoted to railroad purposes. As such, it is private property, subject only to such reasonable regulations as the State may impose for the benefit of the public using such railroad facilities. Mr. Holmberg does not propose to use the cattle pass for any railroad purpose nor as a patron of the railroad. It is a private enterprise from which all other members of the public are excluded. We think the language of *Delaware L. & W. R. R. Co. vs. Town of Morristown,* supra, is applicable:

> "As against those not using it for the purpose of transportation, petitioner's railroad is private property in every legal sense. The driveway in question is owned and held by petitioner in the same right and stands on the same footing as its other facilities. Its primary purpose is to provide means of ingress and egress for patrons and others having business with the petitioner. But, if any part of the land in the driveway is capable of other use that does not interfere with the discharge of its obligations as a carrier, petitioner as an incident of its ownership and in order to make profit for itself has a right to use or permit others to use such land for any lawful purpose. * * *
>
> "* * * The enforcement of the ordinance here assailed would operate to deprive petitioner of the use of the land in question and hand it over to be used as a public hack stand by the individual defendants and others. As to them, and so far as concerns its use as a public hack stand, the driveway was petitioner's private property and could not be so appropriated in whole or in part except upon the payment of compensation.

"Under the guise of regulation, the town cannot require any part of the driveway to be used in a service that petitioner is under no duty to furnish. And, as petitioner's duty here involved is confined to the business of carrying passengers by railroad, the declaration of the ordinance that the specified part of the driveway 'is hereby designated and established as an additional public hack stand' clearly transcends the power of regulation. To compel the use of petitioner's land for that purpose is to take it without compensation in contravention of the constitutional safeguard here invoked."

III.

It is apparent that the order of the Nebraska State Railway Commission not only takes the private property of plaintiff in error so far as the necessary portion of the railroad right of way is concerned, and hands it over to Mr. Holmberg for his exclusive use without any compensation to the owner, but it also takes $1,200.00 in money from the Railway Company—money earned in the transportation of property and passengers—and hands that over to Mr. Holmberg as a permanent investment for his private advantage. We deny the power of the State to do that.

IV.

We think the order of the Railway Commission involved here is no less arbitrary than the order of the State Commission involved in *Great Northern Railway Company vs. Cahill*, 253 U. S. 71. There the State Commission ordered the Railway to install and maintain cattle scales at various stations on the theory that such scales were desirable and necessary to enable shippers to check

the weights of cattle shipped to know whether they were being charged the correct amount of freight charges. But this Court observed that freight charges are uniformly based upon delivery weights at destination and that stock scales at the various stations are used almost exclusively by dealers in livestock for their private convenience, and that the order of the Railway Commission was arbitrary and void. A similar order of the Railway Commission of Minnesota was held arbitrary and void in *Great Northern Railway Company vs. Minnesota,* 238 U. S. 340.

The evidence in this case shows that Mr. Holmberg's farm is not situated differently than any other farm which is bisected by the railroad right of way. He is no more entitled to an underground runway for his stock than every other farmer along the railroad is entitled to. If the State may require the railroad at large expense to install such an underground cattle way for Mr. Holmberg, such convenience may be required for every farmer along the railroad track. Such a rule would surely result in ruinous expense to the railroad company without one cent of corresponding advantage to the public. We believe the only legitimate exercise of police power of the State to compel railroads to spend substantial sums of money for improvements must be limited, first, to improvements which will increase the usefulness of the railroad as a public transportation facility, or, second, which will tend to decrease the hazard of railroad operation to the traveling public on public highways. Inasmuch as the public could never have access to such private runway, no possible ground exists for contending that the improvement is an exercise of the police power in the interest of public

health or safety. Indeed, when we consider that the proposed runway is not designed to accommodate anything but livestock, leaving the farmer and his family and his wagons and machinery to use the surface crossing as heretofore, all suggestions of safety disappear.

V.

Even under Nebraska law the State cannot open a public road or way without first making compensation to private land owners for property so taken or damaged.

For illustration, Section 2607 Compiled Statutes of Nebraska 1922 declares that every section line is a public road in each county in the State, and that the County Board may open such roads whenever, in their judgment, the public good requires it. But it has been held that this does not relieve the County from paying the owner of the land for the highway thus opened. Under this statute, the Supreme Court of Nebraska, *in Rule vs. Sioux County*, 94 Neb. 736-739, says:

> "* * * It is contended that the act of congress of 1866, granting the right of way over public lands, having been accepted by the legislature of Nebraska, plaintiff is not entitled to any damages for the opening of the section-line roads in question. As was said in Scotts Bluff County v. Tri-State Land Co., 93 Neb. 805, 'This statute (meaning the statute accepting the grant) dispenses with formal, preliminary proceedings in the opening of highways on section lines, but preserves the landowner's right to compensation for property taken or injured. Scace v. Wayne County, 72 Neb. 162; Barry v. Deloughrey, 47 Neb. 354.' The grant in question is limited by the proviso

contained in the act of acceptance, that 'any damages claimed by reason of the opening of any such road shall be appraised and allowed, as nearly as practicable, in manner hereinbefore provided.' The enactments to which the proviso refers provide a method of compensating an owner for land taken or damaged for highway purposes. * * * The word 'owner' as used in the statute applies to all persons having an interest in the estate taken or damaged."

For example, if the State or a subdivision thereof, desired to open a new public highway even on a section line which crossed the railroad right of way, the State could not lawfully open such road until it had first acquired from the Railway Company by condemnation or purchase the right to cross and had paid the Railway Company full compensation for the land thus taken. How, then, can the State either directly by statute, or through an order of the State Railway Commission, go through the right of way of plaintiff in error at a point where there is no way, either public or private, and seize a portion of that right of way for a new private way for Mr. Holmberg without the consent of the Railway Company and without compensation. Surely the State cannot do that without violating the 14th Amendment to the Federal Constitution. It is mere confiscation of the Railway Company's property.

VI.

It has been long held in Nebraska as to the rights of citizens generally that the legislature cannot take private property for private use except by the consent of the owner (see cases under point No. 6).

Yet the Supreme Court of Nebraska in its opinion in this case seeks to justify the order of the Commission taking the right of way and money of plaintiff in error for the private convenience of Mr. Holmberg as an exercise of the police power. The police power of the State to require grade separation at railroad expense where the railroad and a public road or street cross is distinguishable from the attempted exercise of such power to take a private way for livestock without compensation and at railroad expense. The State Court's opinion in this case confuses these principles. The State Court replies, as authority for its decision, upon C. M. & St. P. Railroad Co. vs. Minneapolis, 232 U. S. 430. We cannot see the applicability of that decision to the present facts. In that case there was an existing public street in actual use by the public across the railroad track. The public presumably had already acquired the right to cross the track with the street. When the Railway Company was required to elevate its track or build a viaduct at that crossing it was clearly in the interest of the safety of the traveling public on an existing public street. Is there no distinction between the police power of the State to require grade separation under such circumstances and the power of the State to require grade separations for the safety of pigs and cattle on private farms? The State Court's opinion implies that there is no distinction. We think there is. The meaning of the police power, as we understand it, in this respect embraces the safety and health and convenience of the public. And by the public we mean the people who constitute the public in their group capacity. The State Court's opinion says:

"The application of the principles of constitutional law upon which the defendant bases its contention to the facts in this case discloses that the fundamental question involved here is the right of the state, by the exercise of its police power, to eliminate the perils of grade crossings * * *.

"A consideration of cases above cited discloses that the source of the state's authority to adopt regulations for public safety at grade crossings is the police power of the state, and that the elimination of grade crossings, is within the scope of that power. The fundamental fact upon which its existence is justified is that its exercise promotes the safety of either or both of two distinct classes: (1) The passengers transported by the railways; and (2) travelers proceeding over the intersected way. These considerations apply to farm grade crossings * * * The regulation and elimination of farm grade crossings must therefore be deemed properly within the scope of the police power. * * * The extent and conditions upon which this power will be exercised obviously is a matter of legislative discretion on the part of the state."

Analyzing the Court's reasoning:

First, there is no evidence in the record that any accident has ever occurred to any railroad train or person or animal on Mr. Holmberg's farm. None has occurred. To justify taking from the Railway Company a portion of its right of way without compensation and $1,200.00 in money merely to provide an underground runway for the farmer's hogs and cattle on the theory that the State is thereby promoting the safety of passengers on the trains seems fallacious. Is it true that the State has

power to require every railroad now existing to elevate its tracks not only at all public highway crossings both in the city and the country, but to elevate its track everywhere? It would be impossible to eliminate the hundreds of farm crossings without doing that. Needless to say, such an exercise of power would confiscate every railroad in the State. The owners would be much better off to abandon the railroads entirely and the entire industry than attempt to comply with such regulation.

Since, therefore, such regulation would be confiscation, it is an unreasonable suggestion and not a proper and valid exercise of police power. The second ground given by the State Court to justify this order is that it is in promotion of the safety of travelers over the intersected way. In the first place, the present grade crossing is not a public highway but is purely a private way. In the second place, hogs and cattle and horses surely are not *travelers* in the sense that the police power of the State extends to the protection of travelers over public ways. We are necessarily confined to a consideration of the safety of livestock in this case because the proposed underground way is designed solely for the accommodation of livestock. The surface crossing for the farmer and his wagons and implements remains where it is. In the absence of any evidence that the passage of livestock over this farm crossing constitutes a substantial menace to the safe operation of trains, we cannot discover any room for the exercise of the police power on the subject. The Railway Company is not appealing to the State for the protection of trains against livestock on Mr. Holmberg's farm; it has had no occasion to do so. The

passengers on the trains are not complaining; they have had no occasion to complain. How unusual it would be for the State to exercise such supposed police power for the protection of passengers on the train at the request of a farmer who is to be sole beneficiary from the exercise of such power. We deny, therefore, that the power exists. The order of the Railway Commission is arbitrary and a clear confiscation not only of the portion of the railroad right of way necessary for the runway, but $1200.00 in money besides. True, the police power of the State is frequently exercised on the subject of livestock, such as quarantine regulations to prevent the spread of disease among livestock, or inspection regulations to insure pure food from the meat of livestock, or humane reasons, such as the 28 hour law of Congress. But to claim that the police power for the protection of the safety of livestock may be exercised to require grade separation at farm crossings to the same extent as the State may require at public crossings in protection of human life we submit transcends the legitimate scope of the police power, and the State Court is surely wrong in that respect.

VII.

While we understand that the State Court's construction of a state statute is binding on this Court, yet a mere reading of Section 5527 Compiled Statutes of Nebraska 1922 as amended by Chapter 167 Laws of Nebraska 1923 shows that not only is the Railway Commission's order beyond the intended scope of the statute, but likewise the State Court's opinion is beyond anything the legislature intended. It reads:

CORRECTION:

> "When any person owns land on both sides of any railroad, the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same."

This was the Statute as it existed for many years up until the year 1921. Under this language the State Court had held in *Omaha & R. V. Railroad Co. vs. Severin,* 30 Neb. 318:

> "The words of the Statute, 'one causeway or other adequate means of crossing the same,' indicate the legislative judgment that a causeway, whatever it may be, when applied to a railroad, is an adequate means of crossing the track. If the section only applied to such a part of a railroad as is known as a fill, where the roadbed is raised by an embankment above the natural level of the land, it would be reasonably clear that the causeway intended was a raising of the crossroad adjacent to the railroad track with gradients on either side for the convenience of crossing with carriages, wagons, and by horsemen. And I can conceive of no other sense in which the language could have been used in the present instance. Surely the word is not to be confounded with viaduct or bridge, as that means of crossing a railroad could only be cheaply or economically used where there is a very deep cut, which is not common to railroads in this state. This section applies as well to uncultivated as to cultivated land, and to that uninclosed as well as to that which is fenced. The ownership of land, on both sides of the railroad, gives the right of the causeway, or other adequate means of crossing, and not the ownership or possession of live stock by the land owner. The right of an owner

of land on both sides of a railroad to an adequate means of crossing from one part of the land to the other, doubtless within the meaning of the statute, implies the right of such owner to such means of crossing, with any domestic animals under his control. But a careful reading of the fifty sections of the sub-chapter fails to indicate that it was in the legislative mind to provide for unherded animals wandering from one side of a railroad to the other. Neither cattle nor animals are mentioned in the statute, and, as we have seen, the ownership nor possession of cattle adds to the right of an owner of land to adequate means of crossing; the conclusion is therefore not only logical but irresistible that a means of crossing that is adequate for one owner of land on both sides of a railroad is, in contemplation of the statute, adequate for all such owners. If not, then such adequacy depends upon the character of the railroad track and right-of-way between the lands of such owners, whether level, cut, or fill, not upon the use of the land on either side of the railroad, nor upon the possession of cattle by such owner."

And the Supreme Court also held in *Postle vs. C. B. & Q. R. R. Co.*, 98 Neb. 192:

"Where 27 years have intervened between the date of an agreement made by the owner of land with a railroad company concerning the construction of a private farm crossing, and the railroad company, in compliance with the agreement, has constructed and maintained an adequate grade crossing, there is no obligation upon it to build an overhead crossing merely for the convenience of the landowner, unless changed physical conditions require such overhead crossing.

"Where, under such circumstances, it is shown that the railroad company is willing to construct the overhead crossing if the complainant will pay the cost of construction and maintenance, there is no sufficient ground of complaint against the railroad company."

In 1921 and 1923 the Statute was amended by adding the following (Italics ours):

"Any interested land owner with land on both sides of the right of way of any railroad may file written complaint with the State Railway Commission against any such railroad that the crossing *is not adequate* or is unsafe and dangerous to the life and property *of those who use the same*, and the Commission thereupon shall make such investigation and hold such hearing as may be necessary and shall issue such order as it shall deem necessary, proper and adequate. If circumstances warrant, the Commission may require overhead, underground or grade crossings, or may require wing fences at underground crosings, or may require existing crossings to be relocated so as to be safe *to those who use them*, but where such special crossing involves an expenditure of more than $700.00, the land owner shall bear one half the expenses in excess of $700.00."

It seems clear to us that the legislature by these later provisions had reference to the safety of the farmer and members of his family who might have occasion to use the surface crossings. The legislature was not speaking of the safety of live stock. Moreover, it is only "if circumstances warrant" that the Commission is in any instance authorized to order an underground crossing. As we have seen, there is no evidence in this case warranting

any such order. Mr. Holmberg is in the same situation as any other farmer whose land lies on both sides of the track.

VIII.

Since the evidence shows conclusively that the underground runway is solely for the private convenience of the land owner, we deny the power of the State to require a railroad company to give up a part of its right of way and spend $1200.00 in money to promote such convenience. This, because in acquiring the right of way by condemnation, the railroad has already paid the then land owner for every element of inconvenience resulting from the presence of the railroad track.

Section 5278 Compiled Statutes of Nebraska 1922, which is the statute authorizing railroads in building their lines to exercise the power of eminent domain, among other things says:

> "No appropriation of private property for use of any corporation provided for in this chapter shall be made until full compensation therefor shall be first made or secured to the owner thereof."

Section 5283 provides:

> "Any railroad corporation may purchase and use real estate for a price to be agreed upon with the owners thereof; or the damages to be paid by such corporation for any real estate taken as aforesaid, when not agreed upon, shall be ascertained and determined by commissioners to be appointed by the county judge of the county wherein such

real estate is situated, in conformity with the provisions of this article."

It is therefore clear that full compensation and nothing less than full compensation for all damages to the land owner is provided for by law. This includes every kind of damage, including inconvenience to the land owner, inaccessibility, severance damages and every kind of damage which can grow out of the cutting in two of the farm and taking a portion thereof.

In *C., B. & Q. Ry. Co. vs. O'Connor,* 42 Neb. 90, it is said in the syllabus:

"A railway company constructed in a public street in front of the lot and dwelling house of plaintiff, fronting on said street, its railway track, and operated its trains and cars thereon. Subsequently the railway company erected in said street, in front of plaintiff's property, a coal house, hoisting apparatus, and side tracks for use in connection therewith. The coal house had a capacity of forty thousand tons, and was filled from cars pushed on said side tracks. The tenders of the engines of the railway company were run on these side tracks and supplied with coal from the coal house. The walls, foundations, and plastering of plaintiff's house were injured by the concussion produced by heavy trains and engines running to and from said coal house. The occupants of plaintiff's premises were annoyed by the ringing of bells and sounding of whistles of the engines hauling cars to and from said coal house and being loaded with coal thereat. Smoke and steam from engines on said side tracks, and dust and soot arising from the loading and unloading of coal at said coal house, drifted on the

property and into the dwelling house of plaintiff, rendering its occupation uncomfortable, and depreciating its rental value. Held (1) that at the time the railway company first constructed its railway track in the street in front of plaintiff's property there at once accrued to the owner of such property, if he was thereby injured, a right of action against the railway company, and that this right of action was barred after four years from the date of the railway company's first occupation of the street; (2) that had the owner of said property brought such action, the measure of damages would have been the depreciation in the market value of the lot by reason of the construction and proper operation of the railway in the street in front of the property for all time; (3) that this depreciation in value would have been the difference in the market value of the lot immediately before and immdiately after the construction of the railway; (4) that in ascertaining such depreciation the cuts or fills made in the street in front of the property, the proximity of the track to the front of the lot, the danger of fire from passing trains, the probability of damage to the house on the lot from jars caused by passing cars and engines, the inconvenience to the occupants of the property arising from the presence and proper and ordinary use of the railway track for all time, the annoyance to such occupants from smoke, cinders, and dust from passing trains and engines, the annoyance caused by the roar of trains, the sounding of whistles and the ringing of bells, and every other fact and circumstance that would have influenced the market value of the property in the mind of a good faith intending purchaser thereof, would have all been proper elements for consideration in determining the damages to plaintiff's property; (5) that all such ele-

ments of damage would have been included in the appraisement, judgment, or settlement made on account of the original construction of the railway in the street; and such elements nor any of them, could not be made the subject of an action for damages brought by the owner of the property against the railway company more than four years after the date of the original construction of the railway in the street; (6) that the side tracks constructed by the railway company subsequently to the original building of its railway in the street were presumably within the purview of the original location of the railway and did not constitute an additional burden to plaintiff's property, and that its building could not be made the basis of a separate and independent action for damages by the property owner against the railway company; (7) that the coal house and hoisting apparatus erected by the railway company in the street in front of plaintiff's property were presumably not within the purview of the original location of the railroad, and constituted additional burdens to plaintiff's property, and invested him with a right of action against the railway company for damages to his property caused thereby; (8) that plaintiff's right of action against the railway company for damages caused to his property by the erection of such coal house and hoisting apparatus was barred in four years from the date of their construction in the street; (9) that the measure of the plaintiff's damages was the depreciation in the market value of his real estate caused by the location of the coal house and hoisting apparatus and their ordinary and proper use for all time; (10) that, in arriving at the amount of such depreciation of plaintiff's property, the proximity of the coal house and hoisting apparatus to the property, the capacity of the

coal house, the danger from fire, the annoyance from soot, smoke, and coal dust, the probability of damage to the house on the lot from the jars of passing trains and engines, were all competent and proper elements for consideration, as all these things were within the realm of results that would naturally flow from the proper and ordinary use of the coal house and hoisting apparatus, and were involved in and a part of the damages which plaintiff could have recovered on account of the original construction of the coal house and hoisting apparatus; and these elements, nor any of them, could not be made the subject of an independent suit by plaintiff against the railway company brought more than four years after the date of the original construction of the coal house and hoisting apparatus."

In *Churchill vs. Beethe,* 48 Neb. 87, damages were sought against the County Commissioners on account of building a culvert in a public highway. The court says concerning the elements of damage in acquiring such highway.

"All damages, immediate or prospective, which may flow from the proper construction and maintenance of an improvement carried on under the power of eminent domain, must be compensated in the original condemnation proceedings."

In the opinion, pages 90 and 91, it is said:

"It is now the settled law of the state that for all injuries which may arise on account of the proper construction or future operation of an improvement, an adjoining proprietor must be compensated in the original condemnation proceedings

(Omaha & R. V. R. Co. v. Moschel, 38 Neb. 281; Omaha S. R. Co. v. Todd, 39 Neb. 818; Fremont, E. & M. V. R. Co v. Bates, 40 Neb. 381; C., B. & Q. R. Co. v. O'Connor, 42 Neb. 90). In Omaha S. R. Co. v. Todd, supra, it was said: 'In an inquiry whether, and how much, the part of a farm not taken for railroad right-of-way is depreciated in value by the appropriation of a part, evidence as to size of the farm; the purpose for which it is used; the improvements thereon, and how located; the direction of the road across the farm; the cuts and fills made or to be made in the construction of the road; the width of the right-of-way; the height of embankments; the depth of ditches; the inconvenience of crossing the track from one part of the farm to another; the liability of stock being killed; the danger from fire from passing trains, are all facts competent for the jury's consideration in determining the depreciation in value of the remainder of the farm.' The cases are all those of railroads; but the same principles govern the exercise of the right to eminent domain by counties or municipalities, in the absence of qualifying statutes. The effect of the cases is that in assessing damages for the construction of a railroad, the jury has in view all facts affecting the value of the land which may arise from the proper construction and operation of the railroad—not merely in the manner in which it may be first constructed, but for any proper and appropriate extensions or improvements, so long as the original use is not changed. So with the highway. The owner of adjoining lands is entitled to compensation not only for such injuries as might result from the use of the land appropriated in its natural state, but for all which would result from a proper construction, improvement and maintenance of the highway, taking into

consideration such embankments, cuts, bridges, culverts, and ditches as shall be required or warranted for the purpose of a proper construction and maintenance."

In *Beckman vs. Lincoln and Northwestern Railroad Company*, 85 Neb. 228, it is said in the syllabus:

"In a proceeding to condemn real estate for the purposes of right-of-way for a railroad company, 'the land owner is entitled to full compensation for the land actually taken, and for such damages to the residue of the land as are equivalent to the diminution in value thereof.' Fremont, E. & M. V. R. Co. v. Meeker, 28 Neb. 94.

"In an inquiry whether and how much the part of a farm not taken for railroad right-of-way is depreciated in value by the appropriation of a part, it is proper for the jury to consider the liability of stock being killed, and the danger from fire from passing trains. See Fremont, E. & M. V. R. Co. v. Bates, 40 Neb. 381."

In the opinion it is said on pages 231 and 232:

"The legal propositions presented will be noticed. It was conceded that the land taken comprised 7 acres in a strip 150 feet wide through plaintiff's quarter section, leaving 12 acres on one side of the track and 141 acres on the other, 12 acres having been previously taken for right-of-way for another track. Plaintiff sought to prove the value of the 7 acres actually taken and the diminution of the value of the remaining land; the whole being a farm in one compact body. To this defendant objected.

Its contention is that the valuation of the 7 acres should be based upon the average acreage value of the farm. There was evidence that the 7 acres was of the best portion of the land, and hence the most valuable. In addition to proving the value of the land actually taken, the court permitted evidence tending to show the value of the whole 148 acres immediately before the condemnation proceedings and after. This ruling was afterwards corrected, and the witness then testified as to the value of the 141 acres before taking, excluding the 7 acres taken. However, this did not materially change the situation as the testimony of the witness relating to values was practically the same. He had estimated the value of the whole 148 acres at $75.00 to $80.00 an acre before the location of the road, and in his subsequent testimony stated that he thought the 141 acres was worth $80.00 an acre before the construction of the road. To the mind of the writer the contention of defendant is a little difficult of comprehension. From the adoption of our present constitution in 1875 to the present time the uniform holding of this court has been that, in the exercise of the right of eminent domain by the condemnation of real estate for purposes of right-of-way, the land owner is entitled to the value of the land actually taken and the dimunition in value of the land not taken as his damages. Fremont E. & M. V. R. Co. v. Whalen, 11 Neb. 585; Republican V. R. Co. v. Arnold, 13 Neb. 485; Republican V. R. Co. v. Linn, 15 Neb. 234; Blakeley v. C. K. & M. R. Co., 25 Neb. 207; C. K. & N. R. Co. v. Wiebe, 25 Neb. 542; Fremont E. & M. V. R. Co. v. Meeker, 28 Neb. 94; Burlington & M. R. R. Co. v. White, 28 Neb. 166. The instructions of the court on the trial followed this rule."

Having once paid for the element of inconvenience to abutting land owners by reason of the construction of the railroad which is in the same condition now on Mr. Holmberg's farm as when originally constructed, we submit that to again be compelled in the manner proposed to contribute substantial sums of money for the convenience of the land owner violates the condemnation award or judgment which was final when made, and in that respect takes the railroad's property without due process of law.

Therefore, we submit that the Statute of Nebraska referred to as construed by the Supreme Court of the State in this case, which would authorize the taking of the railroad's right of way to the extent necessary for this proposed runway, and which takes $1200.00 in money from the railroad violates the constitutional rights of plaintiff in error.

IX.

But the opinion of the State Court says not only is the statute mentioned valid and binding and full authority for what the Railway Commission has ordered, but also that the State Railway Commission under the Constitution of the State possesses *independent* legislative, executive and judicial power. Therefore, it sems to us if this Court should hold that the Statute complained against as applied in this case does violate the 14th Amendment to the Federal Constitution, there would still be left as a legislative basis for the Commission's order the independent legislative power which the State Supreme Court says the Commission may exercise under the Constitution.

We believe that the powers of the State Railway Commission thus construed are themselves a violation of the constitutional rights of plaintiff in error in that it is a denial of equal protection of the law to plaintiff in error and other railroads, in violation of the 14th Amendment to the Federal Constitution, for the people of the State to create for railroads a plan of government which combines all sovereign power, legislative, executive and judicial, in one commission; while for citizens generally the sovereign power is separated into distinct departments, none of which may exercise any of the powers properly belonging to the other departments.

Priop to the year 1906 when the Railway Commission was created by constitutional amendment, the Constitution of Nebraska embraced a plan of government separating the legislative, executive and judicial powers into the three respective department, and Article II of the Constitution of Nebraska provides:

> "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted."

Then followed in Articles III, IV and V, a frame work of government for these several departments of state power with only such minor infringements of one department on the other as seems inevitable in any such scheme of government.

But in 1906, the people amended the Constitution by adding Section 20 to Article IV, which provides:

> "There shall be a State Railway Commission, consisting of three members, who shall be first elected at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the Legislature. Of the three commissioners first elected, the one receiving the highest number of votes, shall hold his office for six years, the next highest four years, and the lowest two years. The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

The Supreme Court, construing this provision, has held in *Hooper Telephone Company vs. Nebraska Telephone Company,* 96 Neb. 245, as well as in the case at bar, that the Commission is vested with *independent* legislative power, etc., so that, conceivably, if an act of the legislature dealing with the Commission's powers should be held invalid, the Commission might still assert the same legislative authority over the subject by virtue of its independent legislative power. It seems apparent that if the act of the legislature challenged in this case is void, because in conflict with the Federal Constitution, that the order of the Railway Commission would be equally void, regardless of whether it was based upon the void act of the legislature, or upon the unconstitutional exercise of the commission's independent legisla-

tive power. But because the Supreme Court of the State in this case has seen fit to re-assert the independent, legislative, executive and judicial power of the State Railway Commission, we feel bound to challenge that power and point out to the Court our reasons.

The Constitutional provision gives the Railway Commission power over "the regulation of rates, service and general control of common carriers". It is apparent that the scope of this power is broad enough to include every valuable right a railroad company might have. The Commission having been granted by the people in the Constitution of the State, according to the construction of the State Supreme Court, independent legislative, executive and judicial power over these rights of railway companies, including plaintiff in error, it is apparent that so far as the people of the State are concerned, they have not surrounded railroads in the protection of their rights with those fundamental guarantees of civil liberty which inhere in the separation of sovereign power into the three distinct departments, legislative, executive and judicial. On the contrary, the people have placed all three departments of power, so far as the rights of railroads are concerned, in the hands of the State Railway Commission, but with this limitation only "as the legislature may provide by law. But in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision." Since the legislature of the State is not the State government, but only one department thereof, and the people who alone can make a Constitution or change one, cannot and do not control the legislature except by the indirect method of

suffrage, it would seem that the rights of railroads in the respects pointed out are subject to the absolute power of the Railway Commission so far as the constitution makers are concerned. Why should the people create separate and independent legislative authority to legislate for railroads and their rights, not subject to the constitutional restraints placed upon the general legislature? The latter body, when it passes laws, must meet at an appointed time and place, enact its laws according to prescribed forms within certain times and with numerous restrictions which will insure deliberation and some regard for the bill of rights, yet the Railway Commission with its independent legislative power over railroads may, by order, either with or without a hearing, ceate legislation binding upon railroads but no other class of citizen, and unless by mere chance the legislature has enacted some statute forbidding it or interfering with it, the Commission may exercise independent, judicial power and independent executive power over the same subject governed by its independent legislative power. The principle of thus creating a super-government in the form of a Commission of three men with all sovereign powers over one class of citizen, while the citizens of the State generally enjoy a government whose sovereign powers are divided into the three fundamental departments, no one of whom may trangress upon the rights of the other departments, is surely as dangerous today, if not more so, than in earlier times when earnest thought was given to the subject.

Mr. Madison, writing in the Federalist, Pamphlet No. 46, says:

"No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patriots of liberty, than that on which the objection is founded. (Uniting all departments of government under one head). The accumulation of all powers, legislative, executive, and judiciary, in the same hand, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. Were the Federal Constitution therefore, really chargeable with this accumulation of power, or with a mixture of powers, having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system."

And again he says, explaining the arguments of Montesquieu on the subject:

"The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. 'When the legislative and executive powers are united in the same person or body, there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner. Were the power of judging joined with the legislative, the life and liberty of a subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor."

Mr. Jefferson, writing on the same general subject says in his notes on the "State of Virginia", at Page 195; referring to the fact, as he viewed it, that

the legislative department of that state was gradually drawing unto itself all sovereign power:

> "All the powers of government, legislative, executive and judiciary, result to the legislative body. The concentrating these in the same hand is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppresive as one. Let those who doubt it, turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one should transcend their legal limits without being effectually checked and restrained by the others. For this reason, that convention which passed the ordinance of government laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct so that no person should exercise the powers of more than one of them at the same time."

Mr. Madison then concludes his argument with these words:

> "The conclusion which I am warranted in drawing from these observations is that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."

We submit that the equal protection of the law contemplated by the 14th Amendment to the Federal Constitution forbids such a discrimination in the character of government for the people of a State generally as compared to the railroads in that State engaged in the business of common carrier. The language of this Court in *Truax vs. Corrigan*, 257 U. S. 312:

> "The equal protection clause was aimed at undue favor and individual or class privilege, on the one hand and at hostile discrimination or the oppression of inequality on the other; it secures equality of protection not only for all, but against all, similarly situated; it is a pledge of the protection of equal laws,"

seems especially applicable. Of course, the equal laws contemplated in the 14th Amendment embrace constitutional provisions as well as statutory provisions of a State. For the same reason that the legislature of a State has no right to discriminate unjustly against any class of citizen, the people of a state have no right to discriminate, in building their Constitution, against any class of citizen.

Therefore, if the order of the State Railway Commission in this case can conceivably emanate from its *independent legislative power* under the State Constitution, we challenge it as void under the 14th Amendment. The Commission has no independent legislative power, and can have none, under the 14th Amendment to the Federal Constitution which will allow it by order to confiscate the property of plaintiff in error for private use without compensation, nor which will authorize the Commission to take from plaintiff in error in addition $1200.00 for the private advantage of an individual.

CONCLUSION.

In the final analysis, this case is one where an attempt is made both by legislative enactment and order of a State Commission, under the guise of the police power, to deprive the railroad company of a portion of its private property, not for public use, but for private advantage, and in addition, to compel the Railroad Company to make a substantial contribution to the private convenience of a private land owner. The public is in no manner involved, under the facts shown in the record. Neither the public safety, health, convenience, nor welfare will be influenced in any degree by the proposed improvement. It cannot, in the nature of things, affect anyone but Mr. Holmberg and the Railway Company. We earnestly invoke the protection of the 14th Amendment to the Constitution of the United States against the confiscation of private property of plaintiff in error for the private advantage of defendant in error.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

No. 611. 401

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1927.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,
Plaintiff in Error,

vs.

AUGUST E. HOLMBERG,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

REPLY BRIEF OF PLAINTIFF IN ERROR.

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CORRECTION.

The original farm crossing statute of 1866 was in the form quoted at page 7 of brief of defendant in error. Al-

though the meaning is the same, the wording in the first sentence is slightly different than the amended section of 1921 and 1923.

———o———

WAY OF NECESSITY.

Counsel for defendant in error say at page 11, their brief:

> "The statute of 1866 was based upon the common law as to ways of necessity."

We are disposed to agree with this statement. The statute undoubtedly was no more than a declaration of the common law.

The right of an owner of land on either side of the railroad track to a private crossing undoubtedly arises from the implied grant (or implied reservation) whereby the railroad right of way was carved out of the farm, but this right exists as against a railroad company in the same measure that it would against any other purchaser of a similar strip of ground which separated the original estate into two parts. The common law in such a case implied in the grant the right of the grantor to a necessary way of access to the several parts of his remaining estate. The right of crossing is wholly disconnected from the fact that a railroad company happens to be the purchaser of the dividing strip of ground (N. Y. & N. E. R. Co. vs. Board of Railroad Commissioners, 162 Mass. 81, 38 N. E. Reporter 27).

> "If the statute assumed to create a right of way where none before existed, and to put upon the rail-

road corporations the burden of establishing and maintaining crossings for private persons over land held by a railroad corporation under a perfect title, subject to no rights or privileges, it might well be held unconstitutional." (Id.)

But this right to a crossing is a private right and the duty to allow such right of crossing is a private duty of the railroad corporation and not a public duty (Mississippi Railroad Commission vs. Illinois Central Railroad Co., 73 Southern 878, L. R. A. 1917D, page 907.) In that case, it was held that a party could not resort to the State Railroad Commission to enforce such private right but must resort to the ordinary courts for that purpose.

Since counsel for defendant in error concede that the basis of the right to a crossing for the use of the farmer arises from the common law way of necessity, they thereby concede, it seems to us, that the right is a private right as distinguished from a public right, and that the duty of a railroad to provide a way of necessity is a private duty to the land owner and not a public duty which the police power of the state could seize upon by way of regulating railroad companies.

The authority given by the Nebraska Constitution to the Nebraska State Railway Commission does not include jurisdiction over private controversies of railroads, but only embraces the public relations of railroads in their capacities as common carriers. The language of the Constitution (original brief page 45), is:

"The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may

provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision."

Since, therefore, the functions of the Commission are with reference to the public duties of railroads as common carriers and since the right to a private farm crossing does not arise out of any duty of the railroad as a common carrier but is purely one arising by implied grant or reservation at common law, it would seem the Railway Commission should have no jurisdiction whatever over the subject. Whatever right defendant in error may have to a private way of necessity across the railroad right of way, whether arising solely by virtue of the common law or declared by statute, it is a private right enforceable, if at all, in the ordinary courts of justice. Being based upon implied grant or reservation at the time the railroad right of way was acquired, it stands upon the same basis as any other transaction in real estate where the estate granted separates the remaining estate of the grantor.

The implied grant or reservation of a way of necessity will not be extended beyond the necessities of the case. What may be the necessity of the particular case is a judicial question.

The common law right of a private way of necessity is stated in 9 *Ruling Case Law, page* 768, *Section* 31, *as* follows:

"It is a universally established rule that where a tract of land is conveyed which is separated from the highway by other lands of the grantor, or which is surrounded by his lands or by his and those of

third persons, there arises by implication in favor of the grantee a way of necessity across the premises of the grantor to the highway. The basis of this right is the presumption of a grant arising from the circumstances of the case. Necessity does not of itself create a right of way, but it is evidence of the grantor's intention to convey one, and raises an implication of a grant. The presumption, however, is one of fact, and whether or not the grant is to be implied in a given case depends upon the terms of the deed and the facts in that case. Following the general rule above stated, a similar right may be created by implied reservation, notwithstanding general covenants in a warranty deed. The underlying principle is that whenever one conveys property, he also conveys whatever is necessary to its beneficial use, coupled with the further consideration that it is for the public good that land should not be unoccupied. The rule differs from the general doctrine of implied easements in that it does not have reference necessarily to existing servitudes or quasi easements, and therefore it is unnecessary to consider in connection therewith the question of apparent or nonapparent, continuous or noncontinuous servitudes. Since the right of way is founded on a grant, it can arise only between grantor and grantee. No way of necessity can be presumed or acquired over the land of a stranger. If one has an outlet over his own land, although less convenient, he cannot claim a right over the premises of another; or if there already exists a road accessible to him, though perhaps very inconvenient or in a very bad condition, a way by necessity cannot ordinarily be implied. However, according to the prevailing opinion, where other possible modes of access cannot be made available without labor and expense disproportionate to the

value of the property purchased, the right is implied. Ordinarily no right of way by necessity exists where the land to which such right of way is claimed borders on the sea; but if the way by water is unavailable to meet the requirements of the natural uses of the granted lands a way of necessity may be implied over adjoining lands of the grantor. As in the case of the implication of easements generally, and with more potent reasons, a right to a way of necessity may arise where the severance of land is effected by judicial or legal proceedings."

The Supreme Court of Missouri in *Wiese vs. Thien*, 214 S. W. 853, 5 Am. Law Reports, 1522, at page 1555, discusses this common law right as follows:

"The framers of our Constitution were not inventors of the doctrine of private ways of necessity. They existed by the common law, and were usually said to be founded upon a presumption of grant or reservation; as, where one sold a close surrounded by his own estate, he was presumed to grant the easement of access, or, if he sold his surrounding estate, and reserved the close, a reservation would be presumed of the same easement. In Snyder v. Warford, 11 Mo. 513, 49 Am. Dec. 94, the same doctrine was said to apply to the United States as an original proprietor in the disposition of the public lands. Judge Napton, speaking for the court, said: 'The United States, being the proprietor of a section of land entirely surrounded by eight other sections, sells the section so surrounded; the purchaser acquires, by the common law, a right of way to the land he has bought, as a necessary incident of the grant. The case is not altered by the United States' selling the surrounding land to different individuals. The purchasers take it subject to the burden im-

posed on it whilst it belonged to the government, the original proprietor.' "

Mere convenience is not sufficient to authorize a way of necessity. A real necessity must be shown.

In Littlefield v. Hubbard, (*Maine*) 128 Atl. 285, 38 Am. Law Reports, 1306, the grantee of certain lands which fronted upon the ocean had a way of exit and entrance to the land by water route. He claimed a way of necessity over other land of his grantor because of the inconvenience of using the water route. The request was denied, the court saying, page 1308:

"The defendants in their argument admit the long-established rule that, where land borders on the ocean, a public highway, there exists no way of necessity even over a grantor's land, although such passage by water may not be as convenient as a passage by land, since necessity and not convenience is the test. Hildreth v. Goggins, 91 Me. 227, 39 Atl. 550; Kingsley v. Gouldsborough Land Improv. Co. 86 Me. 279, 25 L. R. A. 502, 29 Atl. 1074.

"But, while admitting this rule, they now ask its abrogation or modification in this case because of the great inconvenience, as they claim, attendant upon the use of ocean access to her premises. While all courts agree that there may, under some circumstances, be a way by necessity, they are not in complete agreement as to just what necessity is required. The word 'necessity,' as applied to a way by necessity, has been held not to mean that there must exist an absolute physical impossibility of otherwise reaching the alleged dominant estate. When a way exists, but the expense to be incurred in utilizing it

is grossly in excess of the total value of the estate itself, an easement of necessity is sometimes recognized. Smith v. Griffin, 14 Colo. 429, 23 Pac. 905; Pettingill v. Porter, 90 Mass. 1, 85 Am. Dec. 671.

"But convenience alone cannot give a right of way. Ann. Cas. 1913C, 1112, note to Bussmeyer v. Jablonsky, where may be found a collection of cases sustaining this doctrine, from England, Canada, and from thirty-two states in our Union. In many decisions in that long collection, including Kingsley v. Gouldsborough, supra, the rule is made more restrictive by stating that the way must be one of strict necessity, and that mere convenience is not sufficient. 21 R. C. L. 1214. See also Whitehouse v. Cummings, 83 Me. 91, 23 Am. St. Rep. 756, 21 Atl. 743, where it is distinctly stated as the rule of law in this state that a way of necessity must be one of strict necessity, and not one of mere convenience."

In *Proudfoot vs. Saffle,* 57 S. E. 256 (W. Va.) 12 L. R. A. n. s. 482, it is held that,

"The way of necessity passes with each successive transfer of the title either voluntarily or involuntarily."

The common law rule as to the right to such way is stated, page 484, as follows:

"When there is a conveyance of a tract of land, and there is no means of access thereto or egress therefrom, except over the remaining land of the grantor, a way of necessity over such land is granted by implication of law, whether the transfer be voluntary or by sale under execution.

Many cases are cited in support of this rule.

In *McGurn v. Louisville & Nashville Railroad Company,* 198 S. W. 222, the suit was against the railroad company for damages for obstructing an alleged private way of necessity. The plaintiff had conveyed to the railroad company by deed a strip of land paralleling its right of way over which strip the plaintiff had for sometime maintained a private road. After selling the land to the railroad company, he desired to continue to use this private land which the railroad company desired to have discontinued because the plaintiff already had another farm crossing. The deed to the strip of land in question was absolute, and no reservation of title to the private road was made. The claim of way of necessity was denied because the court says, page 223:

> "Even if it be admitted that a case of strict necessity is here presented, it further appears that the railroad company has actually constructed a road for plaintiff leading through her lands and across its tracks to the public road. While it may be that its travel is attended with some danger and difficulty, this is due to the natural condition of the land itself, for which the railroad company is in no sense responsible. As a matter of fact, the roadway passes over its tracks where they are more nearly on a level than at any other point, and the roadway is as safe and practicable as the circumstances will permit. In the case of Dabney v. Child, 95 Miss. 585, 48 South. 897, it was held that, where a grantor already had a way of necessity over his grantee's land to his own land, he was not entitled to a different way, though the route used by him was at the sufferance of the grantee. Here the land conveyed by the second deed was purchased by the railroad company for the purpose of double-tracking its line of rail-

way. The change in the grades of its tracks was made to meet conditions, brought about by landslides, thus obstructing the existing roadway. There being no express or implied reservation of the roadway, it cannot be said that the railroad company is liable in damages for its obstruction, particularly where it has afforded the grantor another outlet, although this outlet may be longer and attended by certain dangers resulting from the topography of the land."

In *Mississippi Railroad Commission vs. Illinois Central Railroad Company,* 73 Southern 878, L. R. A. 1917D, page 907, the Supreme Court of Mississippi considered a statute of that state which provided:

> "It is the duty of every railroad company to construct and maintain all necessary or proper stock gaps and cattle guards where its track passes through inclosed land; and to make and maintain convenient and suitable crossings over its track for necessary plantation roads. For any failure so to do, the railroad company shall be liable to pay $250 to be recovered by the person interested."

Plaintiff owned land a considerable distance away from the railroad track, but owned a private road extending to the track, and then procured an order from the Railroad Commission of the State requiring the railroad company to establish a private crossing to accommodate such road. The trial court enjoined the order of the Commission and the Commission appealed. The supreme court affirmed the injunction, first on the ground that the plantation owner merely by acquiring a private road leading to the track would not thereby become an

owner on either side of the track within the meaning of the statute, and, second,

> "At all events, if the statute gives a right to require the establishment of a crossing over the track * * * still his remedy to enforce the right would be under the statute, and he could not resort to the State Railroad Commission to enforce his private right instead of going into the courts for that purpose."

This recognizes the principle that the establishment of private crossings is not one of the public duties of the railroad, and that the right of the individual to a crossing is a private right, and not a public right, and is enforceable in the ordinary courts the same as any other private right would be.

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POLICE POWER.

A few state courts have attempted to ascribe the acts of the legislatures requiring farm crossings to the exercise of the police power. We think they have confused the police power with a mere declaration of private common law rights. *Elliott on Railroads says, Volume* 2, *third edition, section* 782, *pages* 142-3:

> "The supreme court of Illinois holds that under the police power the construction of farm crossings may be compelled, but this seems to us a great stretch of the police power * * *."

The Illinois case referred to is *Illinois Central Railroad vs. Willenborg,* 117 Ill. 203, 7 N. E. 698 cited by de-

fendant in error. The decision in that case was, in fact, based upon an express reservation in the deed conveying the railroad right of way whereby the grantor was to have adequate farm crossings. A discussion of what might be done under the police power was unnecessary to a decision of that case.

Powell vs. A. T. & S. F. Ry. Co. 114 S. W. 1066, (Missouri), cited by the Nebraska Supreme Court in its opinion, was a suit in equity to compel the restoration of a passageway under certain trestles in the railroad track. The farmer had enjoyed this passageway for 10 or 12 years and it had been recognized as a way of necessity across the track. Without notice, the railroad filled in these trestles and failed to provide another way. A court of equity required that the "way of necessity" so long enjoyed by the land owner be restored. It was an adjudication upon a question of private right and did not involve the police power.

Dwyer vs. C. & N. W. Ry. Co., 166 N. W. 237, (S. D.) first denied that the police power would be the basis for requiring the building of farm crossings. On re-hearing, 171 N. W. 760, the power was asserted. However, this related purely to surface crossings which, as is well known, can be constructed at small expense and afford passageway for all manner of livestock, vehicles, etc., as well as the family of the farm owner. It is no authority for an attempt to coerce expensive underground passageways for livestock only. The first opinion of the court seems much better reasoned than the second opinion.

In *Oregon Railroad & Navigation Company vs. Fairchild, et al.,* 224 US 210, the power of the state to require track connections between railroads at eight different points was under consideration. The Railway Commission had ordered these connections pursuant to a state statute of Washington which authorized the Commission to order track connections. The supreme court of the United States reversed the order on the ground that it was an unreasonable exercise of police power, and, among other things, said, page 529:

> "The question in each case must be determined in the light of all the facts, and with a just regard to the advantage to be derived by the public and the expense to be incurred by the carrier. For while the question of expense must always be considered, the weight to be given that fact depends somewhat on the character of the facilities sought. If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' But even then the matter of expense is an important criteria to be taken into view in determining the reasonableness of the order. * * * Where, however, the proceeding is brought to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the court must consider all the facts,--the places and persons interested, the volume of business to be affected, the saving in time and expense to the shipper, as against the cost and loss to the carrier. On a consideration of such and

similar facts the question of public necessity and the reasonableness of the order must be determined."

———o———

CONCLUSION.

Since the record shows Mr. Holmberg has enjoyed, (and still enjoys) a surface crossing as his "way of necessity" all these years, and the record shows nothing to create in his favor a necessity for any more elaborate type of crossing; and since mere additional convenience is not sufficient to impose a duty on the plaintiff in error to provide for the land owner an elaborate and expensive type of crossing, the attempt of the state to coerce such expenditure from the railroad company is unreasonable and void. It seems clear to us that the police power of a state which is designed to protect and promote public interests, and to define and require the performance of public duties as distinguished from private duties cannot be extended to require grade separation at farm crossings. Defendant in error may at any time resort to the ordinary courts for the enforcement of his private right to a "way of necessity". The enforcement of such a right stands on the same basis as any other private right against the railroad company as a corporation, such as a debt for supplies furnished to the corporation, for example.

We think that for the legislature to attempt to give such private right a public color by authorizing a public administrative commission acting in a quasi-legislative capacity to administer and add to such private right, or to attempt, by statute, to regulate the private duties of

the railroad company as a corporation to the same extent as the public duties of the railroad company as a common carrier, transcends the police power.

Respectfully submitted,

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In the Supreme Court of the United States

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OCTOBER TERM, 1930.

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Number 1.

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Plaintiff in Error,

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—o—

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

—o—

SUPPLEMENTAL REPLY BRIEF OF PLAINTIFF IN ERROR

—o—

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COCKLE PRINTING CO., LAW BRIEFS, OMAHA

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Number 1.

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CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,
Plaintiff in Error,

vs.

AUGUST E. HOLMBERG,
Defendant in Error.

—o—

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

—o—

SUPPLEMENTAL REPLY BRIEF OF PLAINTIFF IN ERROR

—o—

On October 13, 1930, counsel for defendant in error served upon counsel for plaintiff in error a supplemental brief. This brief is in reply to the suggestions contained in that one, together with such additional suggestions as have occurred to us since the filing of our original briefs more than two years ago.

I.

Defendant in error suggests that we are foreclosed to make any complaint of the Nebraska Statute under consideration because, it is said, the Railroad Company invoked the protection of the statute by reciting in the answer before the Railway Commission that defendant in error had not tendered any part of the expense of the proposed underground crossing. We submit that this was a mere recital that Mr. Holmberg had not even tried to comply with the pretended statute but it in no manner is an invocation of the statute in protection of the plaintiff in error. The prayer of the answer before the Railway Commission (R. 4) is that the complaint of Mr. Holmberg "be dismissed." No other request was made of the State Railway Commission. In any event, the opinion of the State Supreme Court (115 Neb. 727, R. 108) considered that the constitutionality of the crossing statute was squarely presented to it in this case and decided it. We submit, therefore, that the record does not show any such reliance by plaintiff in error upon the challenged statute as to be a waiver of the right to claim its invalidity. Moreover, the fact that the validity of the statute was actually considered and decided by the State Court clearly brings this case within the express provisions of the Judicial Code authorizing this Court to review that decision.

II.

WAY OF NECESSITY

On page 2 of the Reply brief of plaintiff in error, we recite that counsel for defendant in error say at page 11 of their brief:

> "The statute of 1866 was based upon the common law as to ways of necessity."

That statement was correct when written. But after we served our reply brief upon counsel for defendant in error and on the day of the previous argument before this Court, they withdrew their original brief from which the above quotation was taken and substituted their present main brief from which the above quotation was omitted. We did not discover this change until after the oral argument was completed, but wish now to call attention to it. We submit that the admission above quoted was correct.

III.

FURTHER ILLUSTRATIONS OF THE POLICE POWER

Chicago and Alton Railroad Company vs. Tranbarger, 238 U. S. 67, relied upon by defendant in error at page 29 of their brief, upheld a statute which was designed to promote the public health by preventing the impounding of flood waters and stagnant waters along the railroad right of way by requiring the railroad company to establish suitable openings to drain such waters, this Court saying, page 76:

> "* * * The statute in question was passed under the police power of the state for the general benefit of the community at large and for the purposes of preventing unnecessary and wide spread injury to property."

Therefore, that case is not in point in the case at bar, there being no comparable situation presented.

IV.

A valid exercise of the police power requires a legislative declaration of duty by the railroad company designed to promote the public safety, health or welfare. The police power is not invoked when the performance of the act in question is left to accident or the petition or convenience of an individual as in the case at bar.

Counsel for defendant in error at page 30 of their brief say concerning the crossing proposed:

> "It would also add to the safety of travelers and of operatives on the railroad."

But who is to decide that such travelers and operatives on the railroad are in need of protection by the building of an underground crossing for Mr. Holmberg? The statute makes no declaration of duty on the subject of thus protecting travelers. It merely leaves to the uncertain complaint of a private individual that some existing crossing "is not adequate or is unsafe and dangerous to the life and property *of those who use the same*," the question whether or not any such crossing shall ever be built. In other words, the language of the statute in every reference to safety refers to the safety "*of those who use the same*" and this expression clearly refers to persons crossing the railroad track. Since the whole subject of the statute deals with private farm crossings, this expression refers to private farmers and not to the general public. It seems obvious that if the legislature was concerned in this statute with the safety of passengers on the trains, or train operatives, it would have made its intention more definite than the uncertain filing of a petition by a private farmer who desired greater convenience in handling his livestock across the track.

Other statutes of Nebraska which are police regulations illustrate that in each instance there is a legislative finding or judgment pronounced in the statute imposing a duty to be performed for the public safety, health or welfare under appropriate penalties for disobedience. Thus:

Fencing statute, Section 5396 Comp. St. Neb., 1922, provides:

> "Every railroad corporation whose lines of road or any part thereof are open for use, and every railroad company formed or to be formed, but whose lines are not now open for use, *shall within six months* after the lines of such railroad or any part thereof are open, *erect and thereafter maintain fences on the sides of their right of way* * * *, with openings, gates or bars at all farm crossings of such railroads for the use of the proprietors of the lands adjoining such railroad. * * *"

Penalty, liability for stock injured or killed from failure to fence. Section 5397.

Full Crew Bill, Section 5336, says:

> "*It shall be unlawful* for any railroad company doing business in the State of Nebraska to operate or run over its road, etc. * * * any passenger, mail or express train carrying passengers * * * with a crew consisting of less than one engineer, one fireman, one conductor, one brakeman, and one flagman, etc."

Freight Crews, Section 5337, says:

> "*It shall be unlawful* for any railroad doing business in Nebraska to operate or run over its road or any part thereof, etc. * * * any freight train which is not manned with a crew consisting of one engineer, one fireman, one conductor and one brakeman, etc."

There are certain exceptions to these requirements.

Penalty: Section 5339. The officers or agents of any railroad company violating the above sections "shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than $100.00, etc."

Light Engine Crews, Section 5341 says:

"*It shall be unlawful* for any railroad doing business in the State of Nebraska to operate or run over its road from one division to another, or to suffer or permit to be operated * * * any light engine which is not manned with a crew consisting of one engineer, one fireman and one conductor."

Penalty, Section 5343, provides a penalty of not less than $100.00 or more than $500.00 fine for violation.

Waiting Rooms, Section 5374, provides:

"Every railroad corporation shall keep open suitable waiting rooms" and provide suitable toilet facilities for passengers and require such waiting rooms to be heated and lighted.

Penalty, Section 5376 provides for a forfeiture of from one to five hundred dollars for violation.

The duty in the above illustrations is expressly and directly imposed by the legislature, thus amounting to a decision from the legislative department of the Government that the things specified are necessary to the public health, safety or welfare. This is the test of the police power. In each instance the power is exerted directly and in direct behalf of the public. Each illustration, therefore, contains the two essential elements, first, there must be a legislative decision or declaration that a particular act of protection or restraint be done, and second, the

protection declared necessary must be for the benefit of the public.

Compare these illustrations and principles involved in them with the law of 1923 relating to underground crossings for livestock in the case at bar. There, there is no legislative finding that underground crossings for livestock shall ever be built, nor are any conditions specified in the law which could amount to a legislative finding or judgment as to whether or not such structures would be necessary either for the protection of the public or private individuals. Such structures are not even in contemplation unless some private land owner such as Mr. Holmberg desires an underground crossing for his private convenience. Then he, not the legislature, initiates a proceeding before the Commission to ascertain whether he, a private citizen, and for his private convenience, may have such structure built partly, or entirely at railroad expense. The Railway Commission under the Act adjudicates, as a matter of private right and wholly without reference to any public need for the structure, whether the petitioner, Mr. Holmberg, shall have such structure not for any public purpose but for his private convenience. If the Commission decides in his favor then, under the Act, the Commission may order a railroad company to contribute the first $700.00 and 50% of the additional cost not for the public use but for the private use of the petitioner.

Thus, the statute, when tested by other recognized applications of the police power, fails to contain any of the elements which mark the proper exercise of that power, which are:

1. There must be a legislative finding or judgment of some measure for the protection or promotion of the public health, safety or welfare.

2. The means adopted must be in promotion of the public objects mentioned and never in promotion of purely private interests.

———o———

NEBRASKA DECISIONS HERETOFORE RENDERED WOULD RESULT IN THE CROSSING STATUTE BEING HELD VOID.

In *Welton vs. Dickens,* 38 Neb. 767, a statute was held void which attempted to authorize condemnation proceedings to enable any person whose lands were completely enclosed by lands of others to acquire a private roadway over such lands in order to reach a public highway. This situation is certainly analagous to the case at bar so far as the individual's rights are concerned, only the case at bar presents a less difficult situation for the individual because Holmberg has a public highway on two sides of his farm and the private road is desired simply to connect the different parts of the farm. Yet in the cited case the Supreme Court said: (Syllabus 1, 2, 3 & 6).

> "The constitutional provision, 'The property of no person shall be taken or damaged for public use without just compensation,' prohibits, by implication, the taking of private property for any private use whatever without the consent of the owner.
>
> "Such constitutional provision forbids private property from being compulsorily taken or damaged for any but public use, and then only upon just com-

pensation being made, the amount of which is to be assessed by a jury.

"The want of power in a legislature to transfer to one man the property of another without his consent, either with or without compensation, does not depend upon constitutional restriction, but upon the fact that it is not the exercise of the power of making laws or rules of civil conduct, which is the branch of the sovereign power committed to the legislature.

"Sections 47, 48, 49, 50, 51 and 52 of Chapter 78, Compiled Statutes, 1893, authorize the taking of private property for private use, the roads therein mentioned being essentially private and beyond the public control, and said sections are therefore unconstitutional and void."

In the opinion the Court lays down the test of what constitutes a public or a private use at pages 774-5, as follows:

"Now, is the use for which this statute authorizes the taking of appellee's land a public or private one? Is the purpose of this law to take A's property and transfer it to B for the use of the public, or for B's private use? If the private road contemplated by this law is for the use of the public, the law is good; if, on the other hand, the road authorized is for the private use and benefit of an individual, the law is void; and, whether one or the other, is a question of law. To make the use public, it need not be for the benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common, not to a particular individual or estate. (Coster v. Tide Water Co., 18 N. J. Eq., 54)."

Similar reasoning was employed by the Nebraska Court in *Vetter vs. Broadhurst,* 100 Neb. 356. In that case, an irrigation statute of Nebraska attempted to authorize "every person, corporation or association intending to construct and maintain a storage reservoir for irrigation or any other useful purpose * * *" to take land by eminent domain for the purpose of such reservoir site. Under that, an individual who owned a farm through which a creek ran attempted to take five acres of the land of the upper proprietor along the stream, claiming that it was necessary to take such portion of his neighbor's farm in order to build the reservoir site. The Nebraska Court construed the statute in so far as it was claimed it would authorize an individual to exercise the right of eminent domain for his private benefit, no other member of the public being involved, as invalid, and the decision makes the point that, page 362:

> "Public use, in a constitutional sense, may be confined to the inhabitants of a restricted locality or neighborhood, but the use must be common, and *not to a particular individual.*"

Since Mr. Holmberg in the case at bar by proceedings before the Railway Commission seeks to take a private road across the railway right of way for his private convenience and there is to be no common use of the land by even a limited number of the public, the procedure falls under the condemnation of the cited cases.

So that, under the well-reasoned doctrine of previous decisions from the Nebraska Supreme Court, Mr. Holm-

berg's intended right fails and the error of the Nebraska Court's opinion in the case at bar is made manifest.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term 1928.

Number 20 /

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

V.

AUGUST E. HOLMBERG, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF DEFENDANT IN ERROR.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term 1928.
Number 20.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

V.

AUGUST E. HOLMBERG, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF DEFENDANT IN ERROR.

O. S. SPILLMAN, Attorney General of Nebraska,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Defendant in Error.

This is a proceeding in error to the Supreme Court of the State of Nebraska, which affirmed on appeal (115 Nebraska 727) an order of the Nebraska State Railway Commission requiring the plaintiff in error, Chicago, St. Paul, Minneapolis & Omaha Railway Company, to construct an underground farm crossing for the passage of live stock.

I.

STATEMENT.

The defendant in error owns a square quarter section farm through which the right-of-way and the railroad track of the plaintiff in error run diagonally (R. 14, Exhibit 3, R. 46). They enter at the southeast corner and leave near the northwest corner (R. 15, Exhibit 3, R. 46), thus cutting the farm into two almost equal parts. For convenience they will be spoken of herein as the northeast half and the southwest half. The dwelling, the other buildings, etc., are located near the southwest corner of the farm (R. 15). The well and the windmill are also on the southwest half (R. 15). There is no water supply on the northeast half (R. 16). About 900 feet from the northwest corner of the farm, there is a grade crossing (R. 46, Exhibit 3). There are gates in the fence on the right-of-way near the crossing (R. 24). There are no cattle guards at the crossing (R. 31). The crossing cannot be used by the defendant in error, except in winter because the land on either side of it is used for crops (R. 24 and 26). The crossing was built ten or fifteen years ago (R. 24). The railroad was built some thirty years ago (R. 84). For nine months last year the defendant in error did not drive any cattle through the gates (R. 24). He had to drive them around on the public road almost three quarters of a mile (R. 17 and 21) whereas it is only about one thousand feet on a direct line (R. 31). He is willing to have the present crossing taken out (R. 26). The principal pasture on the farm is in the northeast half (R. 25). It is not suitable for hay (R. 22) and because of overflow is only adapted to pasture (R. 16). There is also a small pasture of about 6 acres in the southwest half of the farm (R. 16). The southwest half of the farm is fenced hog tight (R. 17); the northeast half

is fenced with barbed wire (R. 18). If the underground crossing is built, the defendant in error expects to fence the entire farm hog tight (R. 18). The land near the grade crossing is used for farming purposes, and for that reason cattle cannot be driven back and forth across it (R. 25). The fences cannot be arranged so as to drive cattle over the grade crossing without ruining the fields (R. 25). At present the northeast half of the farm cannot be used for hogs, as they cannot be driven across the grade crossing (R. 40).

The underground crossing is essential to the use of the farm as without it the northeast half of the farm cannot be used at all for hogs, and thereby feed in the cornfields, that otherwise could be used, goes to waste (R. 18. It is also essential to the use of the farm because driving the cattle, and particularly the milk cows, a long distance around to the pasture by way of the public road, is detrimental to them (R. 17). It also consumes an hour a day to drive them (R. 21). The defendant in error is also restricted in the number of milk cows he can keep (R. 16), and those he does keep are reduced in milk production about one-third by reason of having to drive them to pasture (R. 17). A grade crossing is more dangerous than an underground crossing (R. 31).

Almost in the middle of 'the farm there is a grade of sufficient height to permit the construction of an underground pass for cattle, horses and hogs (R. 19-20). The defendant in error filed a complaint with the Nebraska State Railway Commission asking that the plaintiff in error be required to construct such a pass (R. 1-3). A full hearing was had and the pass was ordeerd upon condition, as required by the statute, that the defendant in error pay one-half of the cost thereof above $700, the remainder to be paid by the plaintiff in error (R. 11-12).

Upon appeal to the Supreme Court the order of the Commission was affirmed (R. 108).

II.

INACCURACIES AND OMISSIONS IN STATEMENT OF PLAINTIFF IN ERROR.

The statement of plaintiff in error concerning the condition of the farm is confusing because the plaintiff in error has incorporated the record of two hearings concerning this matter in the record herein. The first hearing was June 28, 1922 (R. 64). The second hearing was on April 7, 1925 (R. 6), which was the hearing in the present case. During the meantime the stock upon defendant in error's farm, changed in numbers and the arrangement of the farm was also changed somewhat.

The statement of the plaintiff in error that the sole purpose of the proposed underground crossing is to serve the personal convenience of the defendant in error (Brief 9) is inaccurate. The defendant in error desires a cattle pass because of the danger of driving stock across the grade crossing on the public highway (R. 23); because of the time that he loses in driving the cattle back and forth (R. 21); because of the injury to the stock generally, due to frequent handling, and particularly the injury to milk cows which lessens the production of milk (R. 17); because of the loss that occurs by reason of the waste of feed which could otherwise be used by his hogs (R. 18), and because he has no facilities in his pasture for watering cattle (R. 16).

It is stated by plaintiff in error (Brief 5) that the land which is fenced in the northeast half is meadow land. That statement is directly denied by the defendant in error, who stated that the land had been fenced for 16 years and used as pasture land (R. 24-25).

Attention is also called to an error in the quotation of the statute relating to this subject (p. 32 in plaintiff in error's brief). The statute is correctly quoted in the opinion of the Supreme Court of Nebraska (R. 113). It is also quoted at page 9 of this brief.

Plaintiff in error states (Brief, p. 17, par. IX) that the proposed runway under the track will not eliminate the possibility of accidents. It is also erroneously stated (Brief p. 17, par. X) that under Section 5527, Compiled Statutes of Nebraska, 1922, as amended, only one crossing may be required. It seems to be assumed that the defendant in error desires two crossings. The defendant in error desires only one crossing. He stated (R. 26) that he had no use for the grade crossing and that it might be taken out. In the finding of the Commission it was recognized (R. 10) that the grade crossing might be taken out. Under Section 5527, above mentioned, more than one crossing may be required, but it is not necessary to consider the subject as only one is asked. It is not contended that the land owner is not entitled to a crossing but that he is not entitled to an underground crossing.

III.

ARGUMENT.

Five grounds of error are relied upon by the plaintiff in error. The first charges that the decision violates the Fourteenth Amendment by taking property without due process of law. In the answer filed by the plaintiff in error with the Nebraska State Railway Commission (R. 3-4) it is not charged that the statute under which the order was entered in this case is unconstitutional. In fact, the validity of that statute is expressly recognized; an objection was made because the defendant in error had not tendered or offered to tender to the defendant, plaintiff in error herein, any part of the expense of the crossing

required to be paid by him under the terms of such statute (R. 4). Particular attention is called to the fact that in the answer it is not charged that the statute violates either the state Constitution or the Federal Constitution. An offer to pay whatever the law requires is made in the reply (R. 6).

The errors relied upon in the Supreme Court of Nebraska are not set forth in the record. The Supreme Court of Nebraska, however, considered the charges made by the plaintiff in error that the order of the Nebraska State Railway Commission violated the due process clause of the Fourteenth Amendment and the provision of the Federal Constitution prohibiting the impairment of the obligation of contracts (R. 113).

The second alleged error relates to the power of the Nebraska State Railway Commission. It is charged that the provision of the Nebraska Constitution granting the Railway Commission power to regulate the rates, service and general control of common carriers as the legislature may provide by law (Const. of Neb., Art. IV, Sec. 20) violate the equality clause of the 14th amendment of the Federal Constitution. Considerable argument is devoted to that subject in plaintiff in error's brief (pp. 43-50). As the question was not raised in the original answer of the plaintiff in error, and was, so far as the record discloses, not presented to the state Supreme Court prior to the decision, and was not considered by the Supreme Court, and was only presented to the Supreme Court of Nebraska in the motion for rehearing (Plf. Brief, 2), we take it that it will not be considered by this court. The motion or petition for rehearing does not appear in the record (R. 117).

Bushnell v. *Crooke M. & S. Co.*, 148 U. S. 682.
Kansas City Star Co. v. *Julian*, 215 U. S. 589.

Under the Constitution of Nebraska legislative power, executive power and judicial power may be united in one department.

Constitution, Article II, Section 1.

The amendment to the Constitution creating the State Railway Commission unites such powers in that body.

Constitution, Article IV, Section 20.

This union of power has been approved by the Supreme Court of Nebraska.

Hooper Telephone Company v. *Nebraska Telephone Company*, 96 Neb. 245.

In re Lincoln Traction Company, 103 Neb. 229.

Such union of powers is not repugnant to the Federal Constitution.

Prentis v. *Atlantic Coast Line Co.*, 211 U. S. 210.

Nothing is pointed out to show any possible failure to award the plaintiff in error the equal protection of the laws or to show that it did not have a fair trial before the State Railway Commission. Both parties were required to resort to the same tribunal. There was no violation of any right.

See,

Cincinnati Street R. Co. v. *Snell*, 193 U. S. 30.

The third assignment of error, that the Supreme Court of Nebraska erred in deciding that the order of the Nebraska State Railway Commission was not unreasonable and therefore not in violation of the Fourteenth Amendment, is in part a repetition of the first and second assignments of error and seems to be an effort to have this court review the findings of fact of the Supreme Court of Nebraska. The evidence sustains the findings of the Nebraska State Railway Commission and the Supreme

Court of Nebraska so found (R. 109). We take it that this court will not review the evidence and findings of fact.

Dower v. *Richards*, 151 U. S. 658.

Behn, Meyer & Co. v. *Campbell, et al.*, 205 U. S. 403.

There is nothing in the record, as far as we perceive, to bring this case within the exceptions stated in *Aetna Life Ins. Co.* v. *Dunken*, 266 U. S. 389.

The fourth assignment of error charges that the Supreme Court of Nebraska erred in holding that the order of the Nebraska State Railway Commission was valid under the police power.

The fifth assignment of error is that the Supreme Court of Nebraska erred in holding that the order of the Nebraska State Railway Commission was not in violation of the obligation of contract represented by the condemnation award.

The assignments of error may be considered under these propositions:

1. **The statute authorizing the Commission to require a railroad company to construct an underground crossing, does not take the property of the company without due process of law.**

2. **The order of the State Railway Commission does not violate the obligation of the contract represented by the condemnation proceeding. It only requires the railway company to perform its duty under such proceeding.**

3. **The order is within the police power of the State.**

Most of the cases cited below discuss all three phases.

I.

THE STATUTE AUTHORIZING THE COMMISSION TO REQUIRE A RAILROAD COMPANY TO CONSTRUCT AN

UNDERGROUND CROSSING DOES NOT TAKE THE PROPERTY OF THE COMPANY WITHOUT DUE PROCESS OF LAW.

The statute relating to farm crossings over railways was part of the Revised Statutes of 1866, being Chapter 25, Section 106 thereof (a re-enactment of a territorial act of February 8, 1864), and it reads as follows:

> "When any person owns land on both sides of any railroad, the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same."

This statute was in force when plaintiff in error secured its right-of-way by condemnation proceedings (R. 109). The railroad was built some thirty years ago (R. 84).

It will be observed that the statute provides that the railroad company shall "make and keep in good repair one causeway or other adequate means of crossing the same." As the Supreme Court said, the statute does not (R. 113), purport to describe a grade crossing nor does it preclude a further definition of "other means of crossing the same." In the case of *Omaha & R. V. Co.* v. *Severin*, 30 Neb. 318, cited by the appellant, the plaintiff sought by mandamus to compel the defendant railroad company to put in cattle guards at a farm grade crossing. The question involved in this case was not before the court. It is clear that by putting in cattle guards and allowing cattle and other animals to go at will upon the track would have greatly increased the hazards of operating the railroad. If the Severin case means that the statute above quoted referred only to grade crossings (which we do not at all concede) then it is overruled by the de-

cision of the Supreme Court of Nebraska in the present case.

Postle v. *C. B. & Q. R. R. Co.*, 98 Neb. 192, also cited by the plaintiff in error, involved a change of an existing crossing. The crossing in that case was built under an express contract between the land owner and the railroad company.

The statute of 1866, above quoted, remained in force until 1921 (Laws of 1921, Chapter 261, Section 5527, Compiled Statutes of 1922).

Section 5527 of the Compiled Statutes of Nebraska for 1922, as amended 1923, gives authority to the Nebraska State Railway Commission to require the construction of a crossing as ordered in this case. The section as amended, Chapter 167, Laws of 1923, is copied below. For convenience, the words added in 1923 are italicized. It reads as follows:

> "Section 5527. Whenever any person owns land on both sides of the right-of-way of any railroad, such railroad shall provide and keep in repair at least one adequate means for such landowner to cross the right-of-way. Any interested landowner with land on both sides of the right-of-way of any railroad may file written complaint with the state railway commission against any such railroad that the crossing is not adequate *or is unsafe and dangerous to the life and property of those who use the same*, and the commission thereupon shall make such investigation and hold such hearing as may be necessary, and shall issue such orders as it shall deem necessary, proper and adequate. If circumstances warrant the commission may require overhead, underground or grade crossings and require wing fences at underground crossings *or may require existing crossings to be relocated so as to be safe to those who use them*,

but where such special crossing involves an expenditure of more than *seven* hundred (*$700.00*) dollars the landowner shall bear one-half the expenses in excess of *seven* hundred (*$700.00*) dollars." (Before amendment, amount was six hundred [$600.00] dollars).

That law is in full force and effect and has been in full force and effect during the pendency of this case

While at the present time the statute contemplates more than one crossing and perhaps in that regard has enlarged the statute of 1866, no question as to the construction of two crossings arises in this case. There is no thought of having two crossings on the farm of the defendant in error, as pointed out above (R. 26. R. 10). The later statute, however, has not increased the obligations of the company to provide an adequate crossing, which in many cases must be, in the nature of things, an underground way. The particular sort of crossing was not defined in the Act of 1866, but the statute contemplated an adequate crossing, thus leaving the matter open so that a crossing might be made that would be adequate at the particular time.

People v. *New York Cent. & H. R. R. Co.*, 168 N. Y. 187, 61 N. E. 172, was an action in mandamus to require a railroad company to restore certain culverts in an embankment. It was held that under a statute constituting the charter of the railroad company requiring it to construct convenient passes or roads for the passage of persons, cattle, etc., giving access to a river from which the railroad would otherwise cut off access, that it was not incumbent upon the company to perpetually maintain the culverts deemed necessary when its embankment was constructed to give the owner of land intersected by it, access to a river but that it was sufficient for the company to

maintain such culverts as would meet the existing necessities. The court said:

> "It is manifest on reading this record that the issue of present necessity is tendered, and the granting of the peremptory writ was error, unless it be held, as matter of law, that the charter of the Hudson River Railroad Company must be so construed as to require the defendant to perpetually maintain the culverts deemed necessary in the year 1846, when this embankment was constructed. Such a construction of the statute is unreasonable and would work injustice, not only to the railroad company, but to the owners of property intersected by the tracks of the defendant. From the standpoint of the property owner in a given case it might well be that conditions were such in 1846 that one culvert was amply sufficient for access to the river front, and at the present time, owing to the erection of a large manufacturing establishment, or other changes that may be reasonably assumed, necessity would require in the case of an extended water front a number of culverts."

It is a fact, of which this court will doubtless take judicial notice, that in 1866 very little agriculture was carried on in Nebraska. It was then a territory sparsely settled, and most of its area, where used at all, was devoted to cattle raising. What was an adequate crossing at that time may not be an adequate crossing at this time. With the advancement of agriculture it has often become necessary to provide a different sort of crossing, if an adequate crossing is to be supplied.

N. Y. & N. E. R. Co. v. Board of Railroad Commissioners, 162 Mass. 81, 38 N. E. Rep. 27. It was held that where one conveys to a railroad company the right of way through his land so as to cut off access to a part thereof he has a way of necessity over the land conveyed and that in such case an order of the Commissioners

requiring the railroad to maintain crossings is constitutional as being merely a regulation of the right of way of necessity previously existing in such case and no new burden being thereby placed upon the railroad company.

Jones v. *Seligman*, 81 N. Y. 191, was an action to compel the construction of fences along a railroad and to construct a farm crossing under the track. Judgment was for the plaintiff. The court, in discussing the part of the case relating to crossings, said:

> "It is claimed that the three farm crossings now in existence were all conveniently located, properly made and sufficiently numerous, and that the additional crossing was not therefore required. It is a sufficient answer to this position to say that the propriety of the additional crossing, as well as the condition of the other crossings and their convenience, was a question of fact for the decision of the judge upon the trial. The existence of the old farm road as found by the judge, as well as the necessity of a crossing for cattle at the place designated was a matter to be determined by the evidence and the facts presented. The judge made a personal examination, with the consent of the parties, viewed the premises, and thus arrived at a conclusion. It is not apparent that he erred as to the location of the new crossing under the surface, or in any other respect.
>
> "The location of a crossing is to be made somewhat with reference to the needs, necessities and convenience of the owner of the farm, and he is entitled to be reasonably and fairly accommodated. The circumstances are to be considered, and the crossings should be located in view of all the surroundings, and according to the situation of the adjacent land. The railroad corporation, in the exercise of its duty in providing farm crossings, is

not vested with any such absolute discretion or arbitrary power that its decision is final and conclusive and cannot be reviewed or disturbed. While under the provision of the General Railroad Act, requiring the corporation to erect farm crossings, etc., for the use of the proprietors of lands adjoining, the interest of neither party is alone controlling, the power must be exercised in a proper manner, having due regard to the convenience of the owner of the land, and without subjecting him to needless and unreasonable injury. *Wademan* v. *A. & S. R. Co.*, 51 N. Y. 568. In the case cited, where it was shown that the crossing was inconvenient for the plaintiff and not easy of access, and that the proper place for a farm crossing was at the point where the plaintiff desired it to be made, it was held that an action would lie to compel the defendant to build a suitable crossing. If the crossings made are insufficient in number, or improperly constructed, no reason exists why they should not be increased or improved so as to be made convenient and useful. While their number or the conveniences furnished should not be unlimited, extravagant or burdensome upon the corporation, the owner of the land is entitled, in a certain degree, to the advantages to be derived from a proper and fair exercise of this power. The nature of his rights must depend greatly upon the situation of the farm, and must be determined with a due regard to the rules already laid down. The court may decide as to the kind and character of the crossing to be constructed, its necessity, and the place where it should be located. It appears that there was an embankment at the place where the last mentioned crossing was located; and we may infer that a crossing over the surface would be difficult if not impracticable. The owner of the land was entitled to such a crossing as was suitable under the circumstances, and the judge, in view of the facts, had a right to direct that the crossing should be under the surface of the road. The right to a crossing under the track was a necessity if, for

sufficient reasons, a construction over the surface of the road was not practicable, or would not answer the purposes intended. The principle referred to has been a subject of consideration in the courts, and the right to relief must rest in the sound discretion of the judge, and must be entirely equitable and just. *Clarke* v. *R. L. & N. F. R. Co.*, 18 Barb. 350; *Wademan* v. *A. & S. R. Co.*, *supra*; *Wheeler* v. *R. & S. R. Co.*, 12 Barb. 227. We think that there was no error in the findings of the court, to which reference has been had, and discover no ground for interfering with the conclusion arrived at.

"The proceedings taken to condemn the land, and the damages paid by reason thereof, do not necessarily preclude the plaintiff from maintaining an action to compel the corporation to provide suitable and proper crossings, in case it has failed to fulfill the duty imposed upon it by law. As we have seen, the crossings are to be located and made, having in view the rights of all the parties; and as the corporation may not always conform to this rule, and those provided may not answer the purposes designed, there must be a remedy to enforce the obligation which devolves upon it. If it had entirely failed to make any crossings whatever, most manifestly the courts would be authorized to grant the proper relief. For the same reason it should be compelled to make such crossings as are suitable and necessary for the proper and reasonable use of the farm by the proprietor. The proposition that when lands are taken compulsorily, the proceedings for condemnation contemplate and provide for every form of damage or inconvenience to the owner, is not well founded and cannot be upheld. In *Smith* v. *N. Y. & O. M. R. Co.* (63 N. Y. 58), it was held that a conveyance to a railroad corporation of a right of way to a road across a farm is not a waiver or release of the obligation imposed by the General Railroad Act to erect and maintain farm crossings. Church, Ch. J. says: 'It is said that when

lands are acquired compulsorily, farm crossings are deemed a part of this compensation. I am not prepared to assent to this proposition.' We think that such an item is not a proper subject of consideration in estimating damages for land taken for railroad purposes, and that they have once been made cannot affect the right of the owner to additional ones where these are insufficient."

See also:

Smith v. *New York & Oswego M. R. Co.*, 63 N. Y. 59.

Wheeler v. *Rochester & Syracuse Railroad Co.*, 12 Barb. (N. Y. Sup. Ct.) 227.

Costello v. *Grand Trunk Ry.*, 70 N. H. 403, 47 Atl. 265.

O'Malley v. *Chicago, M. & St. P. Ry. Co.*, 183 Iowa 749, 165 N. W. 1002.

Dubbs v. *Phil. & R. R. Co.*, 148 Pa. St. 66, 23 Atl. 883.

Alabama etc. R. Co. v. *Odeneal*, 73 Miss. 34.

As the statute was in force in 1866 requiring railroads to furnish adequate farm crossings it became a part of the charter of the railroad company. It is no violation of such charter to require the plaintiff to construct such a crossing now. Being an obligation assumed by it, there is no deprivation of property without due process. Under the statute as it originally stood the plaintiff in error would have had to bear the entire cost. The new statute has relieved it of a part of such cost.

II.

THE ORDER OF THE STATE RAILWAY COMMISSION DOES NOT VIOLATE THE OBLIGATION OF THE CONTRACT REPRESENED BY THE CONDEMNATION PROCEEDING. IT ONLY REQUIRES THE RAILWAY COM-

PANY TO PERFORM ITS DUTY UNDER SUCH PROCEEDING.

Under the condemnation it is obligatory on the railway company to establish and maintain an adequate crossing. As it is the duty of the company to provide a crossing the lack of crossing facilities cannot be considered as an element of damage when a right of way is taken.

In *Fremont, E. & M. V. R. Co.* v. *Lamb*, 11 Neb. 592, it is said (596):

> "By the law of this state railroad companies are required to fence their track against stock running at large, and, failing to do so, are liable to the owner of any that may be killed or injured in consequence of this omission of duty. Sec. 2, Art. 1, Ch. 72, Comp. Statutes. And when requested by the owner of land crossed by the road they are required to make and keep in good repair one crossway, or other adequate means of crossing the track. Sec. 106, Ch. 16, Comp. Statutes. The want of means for crossing the road, and the watching of cattle to keep them from the danger of passing trains, therefore, being provided for, have no proper place in a trial of the question of damages for the right of way."

Beardsley v. *Lehigh Val. Ry. Co.*, 142 N. Y. 173, 36 N. E. 877, was an action in equity to compel a railroad company to construct an underground crossing. The plaintiff prevailed. In discussing the effect of the award for damages in condemnation on the right to the crossing the court said:

> "One of the reasons now given for such a crossing is that there may be in that manner provided a safe and convenient passage for cattle to reach water which would be much more inconvenient and unsafe if the only crossings were at grade. The defendant answered that such inconvenience had already been

allowed and paid for by the award in condemnation proceedings, and some of the evidence at that time given was recited as proof of the fact. There was testimony that the line of the railroad would leave the adequate and reliable supply of water wholly on one side of the track, and the resulting inconvenience was taken into account. But the award was necessarily made upon the assumption that proper and suitable crossings would be made by the company, and the damages given are not shown to have rested to any extent upon the form or manner of constructing the crossings. Witnesses may have given their opinions on the supposition that the crossings would be at grade, but they did not say so, and it does not appear that they excluded from their minds the possibility of an under crossing, or that their estimates of the general damage to the farm would have been less if they had taken that possibility into account. The defendant promised nothing of the kind, and did not reduce or seek to reduce the damages by agreeing to give such a crossing. Both parties must be assumed to have stood upon their legal rights as to suitable crossings, and those rights survived the award, and were in no manner extinguished or affected by it. That doctrine was substantially held in *Jones* v. *Seligman*, 81 N. Y. 190."

Lewis, Eminent Domain (3rd Ed.), Vol. 2, p. 1483, Section 851.

III.

THE ORDER OF THE STATE RAILWAY COMMISSION IS WITHIN THE POLICE POWER OF THE STATE.

The right to require a railroad company to construct crossing when it has received its right of way by federal grant, is distinctly recognized in the case of *Northern Pacific* v. *Townsend*, 190 U. S. 267. In that case it was decided that a portion of the right of way of a

railroad company secured by a federal grant could not be held by adverse possession.

This court said (272):

> "Of course, nothing that has been said in anywise imports that a right of way granted through the public domain within a state is not amenable to the police power of the state. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossing of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use."

In *Northern Pac. R. Co.* v. *Ely*, 197 U. S. 1, it is said (5):

> "As before stated, on the fourth day of May, 1903, the decision of this court in *Northern Pacific Railway Company* v. *Townsend*, 190 U. S. 267, was announced. We there ruled that individuals could not, for private purposes, acquire by adverse possession, under a state statute of limitations, any portion of a right of way granted by the United States to a railroad company in the manner and under the conditions that the right of way was granted to the Northern Pacific Railroad Company. At the same time it was not denied that such right of way granted through the public domain within a state was amenable to the police power of the state. And we said: 'Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the

> railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use.'"

Lindemann v. *St. Joseph & G. I. Ry. Co.*, 113 Neb. 284, involved the power of the State Railway Commission under the Act of 1921 (Laws 1921, Chap. 261), above quoted, to require the construction of a grade crossing. It was contended in that case by the railway company that as it had received its right of way under a Federal land grant it might not be required to construct a crossing. It was held, under the authority of *Northern Pacific R. Co.* v. *Townsend*, 190 U. S. 267, that the railway company was not exempt from the police power of the state and the order of the Nebraska State Railway Commission was sustained.

The police power of the state to require the construction of private crossings is recognized in *Fremont, E. & M. V. R. Co.* v. *Lamb*, *supra*.

In *State ex rel* v. *C. B. & Q. R. Co.*, 29 Neb. 412, it is said in reference to the statute concerning crossings over roads, both public and private (417):

> "It cannot be doubted that said section 1 makes it the duty of railroad companies to make and keep in repair all crossings at public highways. The respondent insists that the act is unconstitutional, as it imposed a burden on the corporation that did not exist when it was incorporated. Under the general police power of the state, the legislature has authority to place new and additional burdens upon corporations, when such burdens are for the safety of the people and for the public good, although the power to do so may not be reserved in the charter. This right has been so frequently recognized by the courts that it can no longer well be questioned."

Illinois Central R. R. Co. v. *Willenborg, et al.*, 117 Ill. 203. This is one of the leading cases on the subject. It was an action in injunction by the railroad company against Willenborg, who owned land on both sides of the right of way. The defendant notified the company to construct a crossing at a certain point, stating that in default thereof he would construct it at the company's expense. The bill was filed to prevent such construction. It appeared that the deed from Willenborg's grantor conveying the company a right of way across the land contained a clause obligating the company to erect and maintain suitable crossings. It also appeared that the company had voluntarily constructed and maintained a crossing for the use of the owner of the land at a point about three hundred feet from the point at which Willenborg insisted upon having a crossing. The defendant, Willenborg, (the other defendant was merely a nominal party) denied that the proposed crossing would be dangerous either to the parties using it or to the company. After filing the answer the defendant also filed a cross bill alleging the duty of the company to construct the crossing both by reason of the statute and because of the covenants contained in the right of way deed. The lower court dismissed the original bill and granted the relief prayed in the cross bill. The company took the case to the Supreme Court of Illinois on error.

After a consideration of the provisions of the deed the court referred to the statutory obligation of the company. The court said (207-211):

> "But the decision dismissing the original bill, as was done, may be sustained on the broad ground it was the duty of the company, under the statute, to construct suitable farm crossings for the use of the parties through whose lands its road-bed is constructed. Section 1 of the act of 1874, in relation to fenc-

ing and operating a railroad, makes it the duty of every railroad corporation, within six months after its line is open for use, to construct farm crossings 'when and where the same may be found necessary for the use of the proprietor of the land adjoining such railroad.' Section 3 of the same act provides, whenever a railroad corporation shall neglect or refuse to build or repair such farm crossings, as provided in that act, the owner or occupant of the lands adjoining such railroad through which the railroad track is or may be laid, may give notice in writing to such corporation to build such crossing ten days after service of the notice. Section 4 provides, in case the corporation refuses to build such crossing after notice, as provided in section 3, the owner or occupant of such land may build it, and may recover double the value thereof from the defaulting corporation, with damages. Had similar provisions with these sections of the statute been incorporated in the charter of the corporation, or existed in some law that entered into its charter, it would hardly have been insisted the company would not be bound to observe them, or that their enforcement would violate any provisions of the constitution.

"The point is made, however, that these provisions are not obligatory on this corporation, because they were enacted many years since it received its charter from the state. This is a misapprehension of the law. The regulations in regard to fencing railroad tracks, and the construction of farm crossings for the use of adjoining land owners, are police regulations in the strict sense of those terms, and apply with equal force to corporations whose tracks are already built, as well as those to be thereafter constructed. They have reference to the public security, both as to persons and to property. All property devoted to public uses takes on a nature or qualification *quasi* public, and is for that reason held to be subject to legislative control in a greater or less degree, and to which the mere private property of the citizen is

not subjected. Rights purely and exclusively private, in nowise affecting others, and in no way affecting public morals, are not regarded as being within the control of the police power; nor can mere private property be taken for public uses without making to the owner just compensation; yet the law has always required the citizen to so use his property as not unnecessarily to injure another; and, to compel the observance of that rule, even private property may be brought within legislative control to that extent. But where property, whether belonging to a natural person or to a corporation, becomes 'affected with a public interest, it ceases to be *juris privati* only.' Where a party devotes his property to a public use, the community at large acquire such a qualified interest as will subject it to legislative control for the common welfare. Accordingly, the property of railroads, and other similar corporations transacting business for and with the public, has been subjected to burdens not imposed on the owners of mere private property, used purely and exclusively for private interests. The distinctions in this regard have been uniformly observed. It is for this reason it has been frequently held that railroad corporations, notwithstanding no such right had been reserved in their charters, may be required to fence their track, to put in cattle guards, to place upon their engines a bell, and to do many other things for the protection of life and property. No public exigency has ever made it necessary to impose such burdens on the citizen exercising no functions or occupations in their nature public or *quasi* public. Railroad companies are public corporations, in a limited sense, although the right of way, the road-bed, and the track thereon, are for the exclusive use of the owners, over which only their own conveyances are propelled. All others are excluded. The traffic, however, on railways, bears no analogy to our notions of travel on an ordinary street or highway. The uses are totally different, and even inconsistent. The one is exclusive in favor of the owner, and the other is open and free to all. The common

use of railroads by the public could not be otherwise than dangerous. It is for that reason their use is restricted to the owner. The fact railroad corporations are granted exclusive franchises to conduct a business in its nature public, must subject them to all reasonable control to secure the public safety and welfare. It is now the settled law, that railroad corporations are within the operation of all reasonable police regulations, otherwise there would be no security for the life or property of the citizen residing in the vicinity.

"No reason is perceived why, upon the same principle on which a railroad corporation may be required to fence its track and construct cattleguards, it may not be required also to construct farm crossings. The one is as much required as the other for the convenience and safety of the adjoining land owners. Such corporations are permitted, in order to secure the best and most useful road-bed, to make deep cuts and throw up embankments on their right of way through farms. On account of the peculiar construction of all railways, it is obvious it is impracticable for the owner whose lands are divided by the track, to pass from one part to another unless crossings are provided. Indeed, it would be most dangerous if persons should attempt to cross a railroad track at a point where no provision is made for that purpose, and persons are not permitted to do so. It certainly can not be inferred the legislature would irrevocably grant to a railroad corporation a franchise to construct a railway through farm lands in such manner as to cut off all right of passage to and from the portion separated by the roadbed. The proposition a corporation can construct a railroad from Galena to Cairo, and can not, under the police power of the state, be compelled to construct 'farm crossings' over its track for the use of the owners of lands over which it passes, is too absurd to be considered seriously. That would occasion irreparable injury to the adjoining proprie-

tor, and would be in violation of that maxim of the law, *sic utere tuo ut alienum non laedas.*"

The Willenborg case was cited approvingly in

Village of Atwood v. *Cincinnati, I. & W. R. Co.*, 316 Ill. 425, 147 N. E. 449.

Northern Trust Co. v. *Chicago Rys. Co.*, 318 Ill. 402, 149 N. E. 422.

See

Elliott on Railroads (3rd Ed.), Vol. 3, Sections 1628-1629.

Emmons v. *M. & S. L. R. Co.*, 35 Minn. 503, was an action for damages caused by the failure of the defendant railway company to fence its right of way as required by statute. The complaint was founded on the reduced rental value of the land, due to lack of such fences. The trial judge ruled that only damages caused directly by injury to live stock could be recovered; that consequential damage due to the necessity of herding stock and the consequent reduction of rental value of the land, were not recoverable. The supreme court of the state sustained the complaint and reversed the decision. In doing so it said (506):

> "To regulate the carrying on of any business liable to be injurious to the property of others, like that of operating a railroad, so that it shall do the least possible injury to such property, is as much within the police power of the state as regulating it with a view to protect life from its dangers. There can be no doubt that the state may, under that power, require railroads to be so constructed, maintained, and operated, and so protected or inclosed, that they will injure as little as possible the farms or lands through or alongside of which they run."

The case was again before the court and is reported in 38 Minn. 215. It was again reversed, this time because

the trial judge had limited the recovery to the cost of building the fence. It was remanded and after another trial below, the case reappeared in the supreme court on appeal by the railway company. An exception to the evidence was overruled and the judgment for the land owner was affirmed. 41 Minn. 133. The case was then carried on error to the Supreme Court of the United States, where it appears under the title:

Minneapolis & S. L. R. Co. v. *Emmons*, 149 U. S. 364.

The case in this court involved the sufficiency of the complaint. In the opinion it is said (366):

> "This case had, on a previous occasion, been before the Supreme Court of the state on appeal. The court below had held that the complaint did not state facts sufficient to constitute a cause of action, and dismissed it and refused a motion for a new trial. On appeal from the order denying the motion the ruling below was reversed and a new trial granted. In giving its decision, the Supreme Court, among other things, held that to regulate the carrying on of any business liable to be injurious to the property of others, like that of operating a railroad so that it shall do the least possible injury to such property, was as much within the police power of the state as regulating it with a view to protect life from its dangers; and that the state might, under that power, require railroads to be so constructed, maintained, and operated and so protected and enclosed, that they would injure as little as possible the farms or lands through or alongside of which they run, and that the legislation of the state having this object in view was valid.
>
> "It was objected below that the statute, as thus interpreted, denied to the railroad companies the equal protection of the laws of the state, as required by the first section of the Fourteenth Amendment,

The point of the objection, as indicated in the opinion of the Supreme Court, so far as we can understand it, was this, that the statute in requiring railway companies to fence their roads was a police regulation having for its object to prevent animals from getting on the tracks and the consequent danger of injury to the animals themselves and to railway passengers and employees; and, therefore, to impose penalties and authorize a recovery of damages for non-compliance with the law for other than the resultant injuries to animals and railway passengers and employees, was in excess of the police power of the state, and a departure from its general law, which imposed penalties and damages only for the direct injuries sought to be prevented, and did not extend them so as to cover consequential and possible resulting injuries.

"The answer to this is that there is no inhibition upon a state to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements. For what injuries the party violating their requirements shall be liable, whether immediate or remote, is a matter of legislative discretion. The operating of railroads without fences and cattle guards undoubtedly increases the danger which attends the operation of all railroads. It is only by such fences and guards that the straying of cattle, running at large, upon the tracks can be prevented and security had against accidents from that source; and the extent of the penalties which should be imposed by the state for any disregard of its legislation in that respect is a matter entirely within its control. It was not essential that the penalty should be confined to damages for the actual loss to the owner of cattle injured by the want of fences and guards; it was entirely competent for the legislature to subject the company to any incidental or consequential damages, such as the loss of rent, the expenses of keeping watch to guard cattle from straying upon the tracks, or any other expenditure to which

the adjoining owner was subjected in consequence of failure of the company to construct the required fences and cattle guards. No discrimination is made against any particular railroad companies or corporations; all are treated alike, and required to perform the same duty, and, therefore, no invasion was attempted of the equality of protection ordained by the Fourteenth Amendment.

"It was also objected that the statutes of Minnesota, in requiring the defendant to build partition fences for the benefit of adjoining land owners, or to pay damages for not building them, imposes upon the company a duty not required by contract, common law, or its charter, and is, therefore, a violation of the right conferred by the charter to buy and hold lands for specified purposes, the same as any other land owner.

"To this position we answer that the extent of the obligation and duties required of railway corporations or companies by their charters does not create any limitation upon the state against imposing all such further duties as may be deemed essential or important for the safety of the public, the security of passengers and employees, or the protection of the property of adjoining owners. The imposing of proper penalties for the enforcement of such additional duties is unquestionably within the police powers of the state. No contract with any person, individual or corporate, can impose restrictions upon the power of the states in this respect.

"The objection that by allowing damages for the diminution of value in the adjoining farm caused by the failure of the company to fence its roads and to construct proper cattle guards, is taking property of the defendant without due process of law, falls with the supposed invalidity of such consequential damages which we hold to be within the discretion of the legislature to impose."

The decision of the Minnesota Supreme Court was affirmed.

See also:

Dwyer v. *Chicago Northwestern Railway Co.*, 11 S. D. 535, 171 N. W. Rep. 760.

Chicago B. & Q. R. Co. v. *Illinois*, 200 U. S. 561.

Chicago & A. R. Co. v. *Tranbarger*, 238 U. S. 67 was an action under a Missouri statute requiring suitable openings and ditches across a railway right-of-way for drainage purposes. The suit was instituted by the owner of 60 acres of land injured on account of the lack of such openings. This court said (77):

> "We deem it very clear that the act under consideration is a legitimate exercise of the police power, and not in any proper sense a taking of the property of plaintiff in error. The case is not at all analogous to those which have held that the taking of a right of way across one's land for a drainage ditch, where no water-course exists, is a taking of property within the meaning of the Constitution. The present regulation is for the prevention of damage attributable to the railroad embankment itself, and amounts merely to an application of the maxim *Sic utere tuo ut alienum non laedas.* Of course, compliance with it involves the expenditure of money; but so does compliance with regulations requiring a railroad company to keep its roadbed and right of way free from combustible matters; to provide its locomotive engines with spark arresters; to fence its tracks; to provide cattle guards and gates at crossings, or bridges or viaducts, or the like. Such regulations as these are closely analogous in principle, and have been many times sustained as constitutional. *Minn. & St. L. Railway Co.* v. *Beckwith*, 129 U. S. 26, 31; *Minneapolis & St. Louis Railway* v. *Emmons*, 149 U. S. 364, 367; *St. Louis & San Francisco Ry.* v. *Mathews*, 165 U. S. 1; *Chicago, etc. Ry.* v. *Minneapolis*, 232 U.

S. 430, 438; *Atlantic Coast Line R. Co.* v. *Goldsboro,* 232 U. S. 548, 560, 561.

"And it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of the Fourteenth Amendment."

CONCLUSION.

The construction of the underground crossing would eliminate nearly all of the danger caused by the existing crossing. It would also add to the safety of travelers and of operatives on the railway. It is also essential to the efficient and profitable conduct of defendant in error's farm. The order requiring it is in accord with the statutes and none of the statutes offends constitutional guaranties. The plaintiff in error, in building its railroad, obligated itself to provide adequate crossings. The order only requires performance of that agreement.

The defendant in error asks that the decision of the Supreme Court of Nebraska be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term 1930
Number 1

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

AUGUST E. HOLMBERG, DEFENDANT IN ERROR

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR

C. A. SORENSEN, Attorney General of Nebraska,
HUGH LAMASTER, Assistant Attorney General,
Attorneys for Defendant in Error.

JAY O. RODGERS, LAW BRIEF PRINTER, 130 North Fourteenth St., Lincoln, Nebr.

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I.

Plaintiff in error, having pleaded and relied upon the Nebraska statute relating to railroad crossings (chap. 167, Laws of Nebraska, 1923, p. 397) in its answer

to the complaint of defendant in error, Holmberg, before the Nebraska State Railway Commission, may not now assert unconstitutionality of such statute.

In its answer plaintiff in error alleged, among other things, the following:

> "Further answering, defendant alleges that the cost of installing an underground crossing as alleged in plaintiff's complaint would range from twelve hundred and forty-one dollars ($1,241.00) to two thousand one hundred and twenty-six dollars ($2,126.00) depending upon the size of the crossing to be built and defendant alleges that under the statutes of this state plaintiff would be bound to bear the expense of such crossing or some part thereof and defendant alleges that plaintiff has not tendered nor offered to tender to the defendant any part of such expense and that such tender and security and deposit for such expense is a condition precedent to the plaintiff's right to have any order in his favor as prayed in his complaint." (R. 4.)

There is no statute in Nebraska on the subject of railroad crossings over private lands, except that cited above (copied at page 10 of brief of defendant in error).

A party who pleads a statute and invokes its protection may not, at a later stage of the proceeding, assert unconstitutionality of such statute.

Wall v. *Parrot Silver & Copper Company*, 244 U. S. 407.

Hurley v. *Commission of Fisheries of Virginia*, 257 U. S. 223.

II.

The farm of defendant in error is amply valuable to justify the ordering of a crossing.

While there is no direct evidence in the record as to the market value of the farm, there is ample evidence showing that it is of large value. The farm consists of one hundred and forty-eight acres, being a quarter section less what the railroad takes out (R. 14), (147.78 acres, R. 70), improved with the following: two-story dwelling house, barn, double corn-crib, granary, machine shed, hog house, cattle shed or barn, chicken house, etc., well, windmill and supply tank (R. 15). The southwest half of the farm is fenced hog-tight (R. 17) and the northeast half is fenced with barbed wire (R. 18). There also appear to be yards and a small pasture in the southwest half of the farm. There is also other fencing (Exhibit opposite R, p. 46, marked "74"). Mr. Holmberg apparently has the necessary farm implements, as he has a machine shed (R. 15), including a tractor for plowing (R. 75).

The numbers of live-stock, kept on the farm, vary. At the time of the hearing before the State Railway Commission there were four horses, eight milch cows and ninety hogs (R. 16). Formerly Mr. Holmberg milked fifteen cows. He usually raises about 140 hogs per year (R. 16). These facts establish ample value to show, in connection with the uses of the farm, the absolute necessity of a crossing for livestock if the farm is to be operated efficiently and profitably. Mr. Holmberg is willing to pay the four hundred and fifty-three dollars, his share of the cost of the crossing (R. 59), or more if the crossing should cost more than the estimate (R. 60).

That the value of the farm is sufficient to justify the ordering of a crossing is not questioned in the pleadings, or in the evidence, or in the briefs. It is not mentioned in the assignments of error.

Respectfully submitted,

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Defendant in error calls attention to certain provisions of the Constitution of Nebraska, and to certain statutes of Nebraska, as follows:

Constitution 1920, Article X, Section 8:

> "No railroad corporation organized under the laws of any other state, or of the United States, and doing

> business in this state shall be entitled to exercise the right of eminent domain or have power to acquire the right-of-way, or real estate for depot or other uses, until it shall have become a body corporate pursuant to and in accordance with the laws of this state."

The above section appears in Compiled Statutes of Nebraska, 1922, page 97. The section was part of the Constitution of 1875. It appears in Revised Statutes of Nebraska, 1913, page 46.

Constitution 1875, Article XI b:

> Section 1. "No corporation shall be created by special law, nor its charter extended, changed, or amended, except those for charitable, educational, penal, or reformatory purposes, which are to be and remain under the patronage and control of the state, but the legislature shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this section may be altered from time to time, or repealed."

The foregoing section appears in Revised Statutes, 1913, page 48.

In 1920 the foregoing section was modified.

Constitution 1920, Article XII, Section 1:

> "The Legislature shall provide by general law for the organization, regulation, supervision and general control of all corporations, and for the organization, supervision and general control of mutual and co-operative companies and associations, and by such legislation shall insure the mutuality and co-operative features and functions thereof. Foreign corporations transacting or seeking to transact business in this state shall be subject, under general law, to regula-

tion, supervision and general control, and shall not be given greater rights or privileges than are given domestic corporations of a similar character. No corporations shall be created by special law, nor their charters be extended, changed or amended, except those corporations organized for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the state. All general laws passed pursuant to this section may be altered from time to time, or repealed."

The foregoing section appears in Compiled Statutes of Nebraska, 1922, page 99.

Constitution 1920, Article IV, Section 20:

"There shall be a State Railway Commission, consisting of three members, who shall be first elected at the general election in 1906, whose terms of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the Legislature. Of the three Commissioners first elected, the one receiving the highest number of votes, shall hold his office for six years, the next highest four years, and the lowest two years. The powers and duties of such Commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But in the absence of specific legislation, the Commission shall exercise the powers and perform the duties enumerated in this provision." (Adopted 1906.)

The foregoing section appears in Compiled Statutes of Nebraska, 1922, page 72.

Constitution 1920, Article V, Section 9:

"The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction

as the Legislature may provide; and the judges thereof may admit persons charged with felony to a plea of guilty and pass such sentence as may be prescribed by law."

The foregoing section appears in Compiled Statutes of Nebraska, 1922, page 78.

Compiled Statutes 1922, Chapter 59, Section 5491, page 1738, is as follows:

"If any railway company, common carrier, or any other person or persons affected thereby, shall be dissatisfied with the decision of the railway commission, affirming, revising, annulling or modifying any rate or rates complained of in the original schedule, or any subsequent schedule which may be the subject of investigation, or with the decision of the commission with reference to any rate, classification, rule, charge, order, act, or regulation made or adopted by them upon which there has been a hearing before said commission, except as otherwise expressly provided for herein, such dissatisfied railway company, common carrier, person or persons affected may institute proceedings in the supreme court of Nebraska to reverse, vacate or modify the order complained of. The procedure to obtain such reversal, modification or vacation of any such order or regulation made and adopted, upon which a hearing has been had before the commission, shall be governed by the same provisions now in force with reference to appeals and error proceedings from the district courts to the supreme court of Nebraska. The evidence presented before the railway commission, as reported by its official stenographer and reduced to writing, shall be duly certified to by the stenographer and the chairman of the railway commission as the true bill of exceptions, which, together with the pleadings and filings duly certified in

the case under the seal of the railway commission, shall constitute the complete record and the evidence upon which the case shall be presented to the appellate court: *Provided*, however, the time for appeal from the orders and rulings of the railway commission to the supreme court shall be limited to three months; and provided, further, in no case shall the filing of a supersedeas bond suspend the putting force or operation of any decision, regulation, rate, schedule or order of the commission of any nature whatsoever, unless such supersedeas bond is conditioned and in sufficient amount, to be approved by the commission, to insure the prompt refunding, by the appealing common carrier to the parties entitled thereto, of all charges which such common carrier may collect or receive pending the appeal in excess of those fixed or authorized by the final decision in the cause by the supreme court."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 1—October Term, 1930.

Chicago, St. Paul, Minneapolis and Omaha Railway Company, Plaintiff in Error, *vs.* August E. Holmberg.	In Error to the Supreme Court of the State of Nebraska.

[December 1, 1930.]

Mr. Justice Stone delivered the opinion of the Court.

This case is here on writ of error, allowed under § 237, Jud. Code, before the amendment of Jan. 31, 1928, to review a judgment of the Supreme Court of Nebraska, which sustained an order of the State Railway Commission. 115 Neb. 727. The order directed plaintiff in error to install, at an estimated cost of $1,153 to it and of $453 to the landowner, an underground cattle pass under its tracks, so as to connect the farm lands of defendant in error lying on either side of and adjacent to plaintiff's right of way. The Commission acted under authority purporting to be given by § 5527 Comp. Stat. Neb. 1922, as amended (Laws of Neb., 1923, c. 167), printed in the margin.[1] The plaintiff assails the statute,

[1]Section 5527. Whenever any person owns land on both sides of the right-of-way of any railroad, such railroad shall provide and keep in repair at least one adequate means for such land owner to cross the right-of-way. Any interested land owner with land on both sides of the right-of-way of any railroad may file written complaint with the state railway commission against any such railroad that the crossing is not adequate or is unsafe and dangerous to the life and property of those who use the same, and the commission thereupon shall make such investigation and hold such hearing as may be necessary, and shall issue such orders as it shall deem necessary, proper and adequate. If circumstances warrant the commission may require overhead, under ground or grade crossings and require wing fences at underground crossings or may require existing crossings to be relocated so as to be safe to those who use them, but where such special crossing involves an expenditure of more than seven hundred ($700.00) dollars the land owner shall bear one-half the expenses in excess of seven hundred ($700.00) dollars.

as applied in this instance, as depriving it of property without due process of law, and as impairing the obligation of contract in violation of the federal Constitution.

Defendant's farm comprises a quarter section of land, divided approximately in half by plaintiff's track, which crosses from the northwest corner to the southeast. For fifteen or more years plaintiff has maintained a farm crossing, at grade, now equipped with gates, which connects the parts of the farm near its northwest corner. The state court assumed that the crossing was established before 1921 and while the statute provided only that where the same person owns land on both sides of a railroad, the latter "shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same". Amendments (Laws of Neb., 1921, c. 261, and that of 1923) added the provisions authorizing the Commission to entertain complaint by the landowner that a crossing "is not adequate or is unsafe and dangerous to the life and property of those who use" it, and to require an overhead or underground crossing "if circumstances warrant".

The proceeding now under review was begun in 1924 by defendant's petition to the Commission, setting up, as the sole basis for the order sought, that the surface crossing was inadequate. The only ground of inadequacy alleged or sought to be proved was that the crossing could not be reached without passing through defendant's cultivated fields on both sides of the track, to avoid which, defendant was compelled, in transferring his cattle from water supply to pasture and return, to drive them back and forth a distance of three-fourths of a mile on a public highway which crosses plaintiff's line at grade. The petition stated that an underground pass could easily be established at another point on plaintiff's line, where there was a depression on each side, so as to connect defendant's pasture with the southwest part of his farm, and with a cattle runway extending to his yards and water supply.

The Commission, after a hearing, found the facts as alleged, and others showing that defendant's farm could be more conveniently operated if the proposed pass were established, concluded that the present crossing was "inadequate and impracticable", and granted the order asked. The Commission did not find, nor was there evidence before it tending to show, that the crossing was not adequate for the passing and repassing of such persons and cattle as

would normally go from one part of defendant's farm to the other in conducting usual farm operations.

The state court, in passing on the order, had before it only the evidence given and proceedings had before the Commission. Saying that the record did not adequately present the point, it assumed, upon the basis of concessions stated to be in briefs before it, that plaintiff acquired its right of way by condemnation prior to 1921. It pointed out that at that time the statute required plaintiff to maintain a causeway or "other adequate means of crossing" between the two parts of the farm. It said that compensation for the land condemned must be taken to have been assessed in view of the provisions of the statute, and that plaintiff took its right of way subject to the statutory obligation to construct and maintain the "adequate" farm crossing defined by the statute. It mooted, without deciding, the question whether the present crossing was adequate within the meaning of the statute as originally enacted, suggested that there might be "a further definition" of adequacy "by the state in proper exercise of its police power", and supported the order of the Commission on the ground that the state could, in the exercise of its police power, "eliminate the perils of grade crossings".

There is no occasion for us to consider how far, if at all, the state's power to remove the dangers of public grade crossings, see *Erie Railroad Co.* v. *Board of Public Utility Commissioners*, 254 U. S. 394, extends to private farm crossings when unsafe to the traveling public or individual users. The Nebraska statute has delegated to the State Railway Commission authority to order farm crossings underground because either inadequate or dangenerous, if circumstances warrant. But there is nothing in this record to suggest that the order of the Commission was either asked or granted as a safety measure. The Commission did not find that the crossing was dangerous either to the public, the litigants, or their property. Neither did it find that this crossing was in anywise different from the usual farm crossing at grade. True, there was testimony that cattle passing over the crossing needed to be attended and controlled to prevent injury to them by trains. But this was no more true of that crossing than of surface farm crossings in general. The case is one of a single track branch line. The track is straight and it was conceded on argument before this

Court that there were only four trains a day. While there are bare assertions in the testimony that the private crossing was dangerous, there was no evidence of any danger beyond that which would attend the use of any farm crossing. Neither the Commission nor the state court regarded the statute as condemning all such crossings, doubtless because the statute distinctly includes that type of crossing among those which it authorizes the Commission to require, its words being, "the Commission may require overhead, underground or grade crossings" as the circumstances may warrant. It is plain that the Commission proceeded upon the assumption that the statute authorized it to compel plaintiff to establish the underground pass for the convenience and benefit of defendant in the use of his own property, and that that alone was the ground and purpose of the order. The application thus given to the statute deprives plaintiff of property for the private use and benefit of defendant, and is a taking of property without due process of law, forbidden by the Fourteenth Amendment. *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403; *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196; *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340; *Great Northern Ry. Co.* v. *Cahill*, 253 U. S. 71.

The judgment below, which affirmed the Commission's order, is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.